THE CONVEYANCER
AND
PROPERTY LAWYER

VOL. 4, No. 3. MARCH, 1940

AN INVITATION TO OUR SUBSCRIBERS.

The publication of the story of the life of an American lawyer, under the title "Country Lawyer" (reviewed *post*, at p. 311) suggests to us that many English country solicitors must have equally entertaining stories to tell. We therefore invite our subscribers to send articles of reminiscence for publication in the Journal. We will pay at our usual rates for articles accepted, and in addition the publishers offer to the writer of the article which, in the opinion of the editors and publishers, is the best submitted, a copy of the recently published 14th edition of *Lewin on Trusts*.

Articles should not exceed 5,000 words in length, should be typed on one side of the paper only, and bear an indication of their length. The best way we can explain the kind of article wanted is to say that they should be in the style of the book "Country Lawyer" (which we strongly recommend subscribers to read in any case), that is to say, a nice blend of legal and human interest. All articles should reach us before June 30, 1940.

The attention of subscribers is drawn to Form 28 (*post*, p. 497), which corrects an unfortunate misprint in Volume 21 of *The Conveyancer*.

SOME ANOMALIES OF THE LANDLORD AND TENANT (WAR DAMAGE) ACT, 1939.

By P. H. Thorold Rogers, Barrister-at-Law.

The first and principal objection which can be levelled at the Landlord and Tenant (War Damage) Act, 1939 (*a*), is its complexity. So far as agricultural and mining leases (*b*) are concerned the provisions of the Act are commendably straightforward and simple; if the buildings or works comprised in the lease are rendered unfit by war damage the tenant may apply to the Court which may make such alteration in the lease "as appears just". Other leases are not so simply dealt with; the tenant will only be able to obtain a full appreciation of his position by a study of sections 4 to 12 inclusive, and if there is any possibility of the lease being a "ground" or "multiple" lease as defined by the Act (*c*) he will have to consider sections 13 to 16 as well. These sections between them appear to the author to combine the evils of complexity with those of unnecessary rigidity; their only substantial merit (if it can be regarded as such) is that in the event of air raids on a large scale there will be enough work to keep every solicitor in the damaged district busy serving notices and counter-notices for weeks after the damage has been caused.

But in addition to these general strictures it is possible to advance more particular and detailed instances of uncertainty which justify criticism and to indicate one or two serious lacunæ. Right at the heart of the whole Act is the definition of "war damage" in section 24. This follows one of the two standard forms adopted by the draftsmen of the emergency legislation. It reappears in an almost identical form in the Liability for War Damage (Miscellaneous Provisions) Act (*d*) and in the Essential Buildings and Plant (Repair of War Damage) Act (*e*) and the Housing (Emergency Provisions) Act (*f*) and is as follows:—

> "'war damage' means damage caused by, or in repelling, enemy action, or by measures taken to avoid the spreading of the consequences of damage caused by, or in repelling, enemy action".

(*a*) 2 & 3 Geo. 6, c. 72.
(*b*) Defined in s. 24.
(*c*) S. 24.
(*d*) 2 & 3 Geo. 6, c. 102.
(*e*) 2 & 3 Geo. 6, c. 74.
(*f*) 2 & 3 Geo. 6, c. 73.

In contrast to this is the definition adopted in the Compensation (Defence) Act, 1939 (*g*) (though it must be admitted that the actual phrase there used is "war operations") :—

> "action taken by an enemy, or action taken in combating an enemy or in repelling an imagined attack by an enemy".

Without attempting to deal with the deficiencies of the latter definition it is clear that it is in one respect more extensive than that in the Landlord and Tenant (War Damage) Act, for it extends to damage caused by the repelling of an *imagined* attack (*h*).

When one finds that this type of damage is so specifically and clearly dealt with in one Act the inference that it was intentionally excluded from the Landlord and Tenant (War Damage) Act is irresistible. But what a vista of opportunities for litigation and ingenuity this opens up! The landlord whose property has suffered war damage and whose tenant is subject to a repairing covenant will be able to hold him to the full tenor of his lease if (*i*) the damage was caused by, for instance, the mistake of a battery commander who opened fire on a neutral or allied plane, or, and this is perhaps equally possible, on no plane at all.

If authority is required to support what is after all nothing more than a simple matter of construction it will be found in a decision under the Marine Insurance Act, 1906 (*k*). In accordance with this Act a policy of insurance was effected on a cargo against general average loss, to include "loss . . . incurred for the purpose of avoiding, or in connection with the avoidance of, a peril insured against". In the course of the voyage a general average loss was caused by steam being turned into the holds in an attempt to extinguish what the captain in the best of faith reasonably believed to be a fire. Had the belief been justified the damage caused by steam would, of course, have been within the policy; but in fact the captain's assumption, though *bona fide*, was incorrect. It was held that there was no loss within the policy, for—

"The words of the Marine Insurance Act, 1906 (*k*), do not justify me in saying that there is a peril whenever it looks as if there was a peril. . . . I am of the opinion that the effect of the sub-section is to bring in losses collateral to the main process insured against and that it does not touch losses incurred in a

(*g*) 2 & 3 Geo. 6, c. 75.

(*h*) A writer in the last issue of the Conveyancer drew attention to the impossibility of giving a grammatical interpretation to these words.

(*i*) On which side the onus of proof will fall depends on the course followed; if a notice of disclaimer or a notice to elect is served the land will be deemed to be unfit by reason of war damage until the contrary is proved. In each case the landlord will be the applicant, but the onus of rebutting the presumption will rest in the first case on the landlord, in the second on the tenant (s. 6).

(*k*) 6 Edw. 7, c. 41.

mistaken attempt to avoid a peril in fact non-existent": *per* Rowlatt, J., in *Joseph Watson & Son, Ltd.* v. *Fireman's Funds Insurance, etc., Co.* (*l*).

To what does the definition extend? There have been numerous cases recently of substantial damage being caused to property by the explosion of mines along our coast and at least one unfortunate and disastrous munitions explosion. The latter is clearly outside the scope of the Act, but what of the former?

It is felt that there is nothing forced in including such damage within the head of damage caused by enemy action and, therefore, as covered by the Act. But enemy mines do not always explode of their own accord and when they are washed ashore without exploding it is the risky duty of the ordnance or other experts to remove them or render them harmless. In some cases the mine is intentionally exploded as the best way of dealing with the danger; but, though this may be satisfactory from many angles, it presents the local owners of property with some pretty problems. During the last war, when there was no legislation similar to that under discussion, at least one claim was made for compensation in similar circumstances under the Indemnity Act, 1920 (*m*). The Commissioners rejected it, but the Scotch Court of Session remitted the case with a direction to them to assess the compensation: *Monypenny* v. *Commissioners of the Admiralty* (*n*).

If the natural explosion of the mine is "enemy action" it would not be unreasonable to regard its intentional detonation as the repelling of enemy action and so within the Act.

Before we leave this definition it remains to point out that it nowhere refers to damage caused in the course of an attack by Allied forces. If a squadron of bombers on its way to Germany were to unload a cargo of bombs on a south coast port could the consequences be described as damage caused in repelling an enemy attack? (*o*) This at the least is doubtful; but can any doubt be felt that the failure of a bomber during a trial flight is *not* within the Act?

The Act invites criticism from another aspect. Part I is headed "modification of obligations to repair". So far as it goes it appears to be simple and easy to apply, but there are some bad lacunæ. The purpose of this Part of the Act is to release people

(*l*) [1922] 2 K. B. 355.
(*m*) 10 & 11 Geo. 5, c. 48.
(*n*) [1922] S. C. 706.
(*o*) The explanation may lie in regarding all our efforts in the course of the war as measures taken to repel a general attack on us by our enemies, but if this is correct the inclusion of an "imagined attack" in the definition in the Compensation (Defence) Act, 1939 (cited *supra*) is surely unnecessary.

from the hardships of the rules in *Matthey* v. *Curling* (*p*) and *Redmond* v. *Dainton* (*q*). These rules are really twofold (and are of course always subject to any express provision to the contrary): firstly, a tenant remains liable for rent notwithstanding the destruction of the property comprised in the lease (*r*), its requisition by the Government (*s*) or even the internment of the tenant himself (*t*); and secondly that a covenant to repair extends to damage caused by Government or enemy action (*u*). Precisely similar principles will of course apply to the landlord or mortgagor who has undertaken a similar liability. So far as the liability for rent is concerned the Act confers a limited right to relief. By serving a notice of disclaimer (*x*) the tenant may disclaim the lease entirely (subject to the landlord undertaking to repair, in which case rent will be suspended until this has been done (*y*)); alternatively the tenant may serve a notice to retain (*z*) in which event he will be relieved from rent until he has completed the repairs (*a*) (unless he delays unreasonably (*b*)). But until one or other of these orders has been served rent will continue to accrue due, and not only the tenant but any guarantor of the lease and, if the tenant in occupation is an assignee, the assignor will remain liable for it. If rent ceases to accrue under the Act during a "rent period" it will be apportioned under the Apportionment Act, 1870 (*c*), but no such relief can be claimed for rent which had already accrued due in advance (*d*).

The Act has dealt more fully with the obligation to repair, but here also difficulties are apparent. It provides that wherever an obligation to repair is imposed "by virtue of the provisions (whether express or implied) of a disposition or of any contract collateral thereto" (*e*) or wherever "a disposition is made under or in pursuance of an enactment which imposes an obligation to

(*p*) [1922] 2 A. C. 180.
(*q*) [1920] 2 K. B. 256.
(*r*) *Paradyne* v. *Jane*, Aleyn 26; *Matthey* v. *Curling*, [1922] 2 A. C. 180; *Redmond* v. *Dainton*, [1920] 2 K. B. 256.
(*s*) *Whitehall Court, Ltd.* v. *Ettlinger*, [1920] 1 K. B. 680.
(*t*) *London and Northern Estates Co.* v. *Schlesinger*, [1916] 1 K. B. 20.
(*u*) *Matthey* v. *Curling*, [1922] A. C. 180. As to a covenant to yield up and repair, see *Brown* v. *Royal Insurance Society* (1859), 1 El. & El. 153; *Matthey* v. *Curling* (*supra*), at p. 239.
(*x*) S. 8 (2) (a).
(*y*) S. 11 (1) (b). At common law no relief from rent or compensation for disturbance can be claimed in respect of the performance by a landlord of his covenant to repair (*Saner* v. *Bilton*, 7 Ch. D. 815).
(*z*) S. 4.
(*a*) S. 10 (1) (b).
(*b*) S. 10 (1) (c).
(*c*) 33 & 34 Vict. c. 35.
(*d*) *Ellis* v. *Rowbotham*, [1900] 1 Q. B. 740.
(*e*) S. 1 (1).

repair. . . ." (*f*) such obligation to repair shall not extend to war damage (*g*).

"Disposition" is widely defined (*h*): it means "any instrument (including an enactment) or oral transaction, . . . creating or transferring an interest in land" and the word "interest" is further defined to mean "any estate or interest in land whether legal or equitable". Covenants to repair in leases, in mortgages and indeed in all forms of conveyance would seem to be covered; but no relief whatsoever is given to the person who has less than an interest in land although his obligations may well be just as severe.

It is well known that the right to erect and maintain hoardings on the land of another for advertising purposes does not create any estate or interest in the grantee (*i*); similar contracts for the erection of advertisements—especially electric signs—on the walls of buildings may or may not be leases. There is seldom a right to exclusive possession and unless this is conferred the agreement confers no estate in the land but a mere licence (*k*). Nor will such grants create an easement—a legal interest—unless the purpose of it was solely for the benefit of the grantee's neighbouring property. Where there was a lease of a petrol station and included in the parcels was the grant of a right to use the wall of adjoining premises for advertising purposes the right was no easement but a bare licence as the advertisements were not necessarily restricted to the business carried on at the garage (*l*).

Contracts for the grant of a so-called lease to a stall-holder in a restaurant, theatre or railway station are often found to be mere licences (*m*) yet they not infrequently contain repairing clauses, which, unless some extension of the doctrines of frustration at common law can be discovered, will remain effectual notwithstanding the occurrence of war damage. It is also somewhat doubtful whether the obligation imposed upon the landlord of smaller properties under the Housing Act, 1936 (*n*), to warrant their fitness for habitation and to maintain them in such a state can be brought within the Act. A lease to which the Housing Act

---

(*f*) S. 1 (6).
(*g*) S. 1.
(*h*) S. 1 (5).
(*i*) Cf. *Wilson* v. *Tavener*, [1901] 1 Ch. 578.
(*k*) *Ib.* As to frustration, see *Fried Kempf* v. *Orconera Iron Co.* (1919), 88 L. J. Ch. 304.
(*l*) *Chapman* v. *Edwards*, [1938] 2 All E. R. 507.
(*m*) See, *e.g.*, *Warr & Co.* v. *L. C. C.*, [1904] 1 K. B. 713; *Edwardes* v. *Barrington* (1902), 85 L. T. 650; *Clore* v. *Theatrical Properties, Ltd.*, [1936] 3 All E. R. 453.
(*n*) 26 Geo. 5 & 1 Edw. 8, c. 51, s. 2. (£40 in London and £26 elsewhere.)

applies is surely not "made under or in pursuance of" (*o*) it; nor is the obligation implied "by virtue of the provisions of" the lease (*p*).

The covenant implied into a letting of furnished premises at common law is not an obligation *to repair* (*q*), nor is the rather similar obligation upon the seller of a half-built house who covenants to complete it for the buyer (*r*), though in this case destruction by enemy action might perhaps operate as a frustration.

It is not beyond the imagination to conceive of an obligation to repair which is created "in gross", that is, which is neither "contained in" nor is "collateral to" a disposition.

For instance—a licence to build so as to obscure the lights of a neighbour might well be granted on condition that the grantee covenanted to keep the buildings to be constructed in repair. This is not within the Act. On the other hand if A grants to B the right to erect a lean-to against A's wall on condition that B keep the wall and the lean-to in repair B will be entitled to claim the protection of the Act; for his covenant is contained in a "disposition"—namely, an instrument which creates an interest (easement of support) in land.

There is also another very remarkable and most important omission which has already drawn a certain amount of attention in legal periodicals. Although the Liability for War Damage (Miscellaneous Provisions) Act, 1939 (*s*), contains in section 1 provisions designed to relieve a bailee of goods from any obligation to insure them against loss or damage by war (*t*) there is nowhere to be found in the war legislation any similar relief for the tenant, or (for it does sometimes happen that the obligation rests upon him (*u*)) the landlord.

In the only case which has as yet reached the Courts during the present war neither of the two decisions from the last war was referred to; in *Moorgate Estates, Ltd.* v. *Trower* (*x*) it was held that the failure of a mortgagor to obtain cover against aircraft and certain other war risks constituted a breach of covenant on which the mortgagee could rely. The mortgage in this case contained an express covenant to insure against these risks (*inter alia*)

(*o*) S. 1 (5).
(*p*) S. 1 (1). Unless it can be said to follow from the provisions as to rent.
(*q*) *Smith* v. *Marrable* (1843), 11 M. & W. 5; *Cruse* v. *Mount*, [1933] 1 Ch. 278.
(*r*) *Miller* v. *Cannon Hill Estates, Ltd.*, [1931] 2 K. B. 113; *Perry* v. *Sharon Development Co., Ltd.*, [1937] 4 All E. R. 390.
(*s*) 2 & 3 Geo. 6, c. 102.
(*t*) Defined in s. 8 in terms to all intents similar to that in the Landlord and Tenant (War Damage) Act, which has already been discussed.
(*u*) *Enlayde, Ltd.* v. *Roberts*, [1917] 1 Ch. 109.
(*x*) [1940] W. N. 18; 1 All E. R. 195.

and it is most material to bear in mind that at the time when the mortgage was executed it was still possible to obtain insurance cover of the sort stipulated for; nor could it be argued that the mortgagee had acquiesced in a more limited form of policy, for he had protested almost immediately against the inadequacy of the one obtained by the mortgagor.

During the war of 1914—1918 the Courts had on two occasions to consider the effect of a covenant to insure generally against fire, but so far as the author can ascertain there was no decision on an express covenant to insure against war risks. In *Enlayde, Ltd.* v. *Roberts* (*y*) we have the rather unusual case of a landlord taking upon himself an obligation to insure "against loss or damage by fire in some insurance office of repute"; the decision is at first a little difficult to follow as it is complicated by the surrounding and irrelevant facts, but the salient feature which emerges from a careful study of the *ratio decidendi* is that where the covenant is drawn in as general terms as this the liability on the covenantor is absolute. It is immaterial whether the parties contemplated war risks at the time when they entered into the covenant, for "in my judgment it is quite sufficient for the plaintiff to establish that the words used cover the event in question whether the parties did or did not in fact apply their minds to that event" (*z*).

The defendant here attempted to call evidence to show that it was not the practice of insurance offices of repute to include cover of this sort within the scope of their policies, but Sargant, J., held such evidence inadmissible. He did in fact admit it *de bene esse* but, having done so, he pointed out that the evidence was very unsatisfactory for it established that there was no common form policy in use by all "offices of repute" and that it could not therefore be inferred that the parties meant to refer to a particular form of policy. "Not only do the expressions in the different policies vary, but the substance of the policies vary to an appreciable extent. . . . I think that there is no such settled practice as would enable me to attach to the plain words of the covenant any satisfactory definite secondary sense" (*a*).

The second decision is that of *Upjohn* v. *Hitchens*, *Upjohn* v. *Ford* (*b*). This was a decision of the Court of Appeal—Warrington and Scrutton, L.JJ.—Pickford, L.J., dissenting. The covenant was a lessee's covenant to "insure and keep insured the demised premises against loss and damage by fire in the names

(*y*) [1917] 1 Ch. 109.
(*z*) [1917] 1 Ch. at 122, *per* Sargant, J., distinguishing *Yuill & Co.* v. *Robson*, [1907] 1 K. B. 685; [1908] 1 K. B. 270.
(*a*) [1917] 1 Ch. at 120.
(*b*) [1918] 2 K. B. 48, C. A.

of the lessor and lessee in the Imperial Insurance Co. or in some other responsible office in London or Westminster to be previously approved of in writing by the lessor."

The issues were thus summed up by Warrington, L.J. (*c*): "Does that expression mean loss and damage by fire however occasioned, or does it mean such loss and damage by fire as is provided for by a policy, meaning thereby such a policy as both the lessor and the lessee would expect to get if they made an ordinary application to the [named company] for a fire policy?" He and Scrutton, L.J., admitted evidence and the latter referred to text-books to show what were the normal contents of a fire policy issued by the named company: "It seems to me that in this and other matters where a person has covenanted to get a commercial document, evidence is admissible as to the course of business in reference to such a document and as to the kind of document the person will get from [an insurance company] who is under no obligation to grant it" (*d*).

The effect of this decision is, it is submitted, to make admissible evidence of the contents of normal fire policies; the covenantee will perform his liability by effecting a policy in the usual form, and, if the company in question alters its forms during the lease it will be sufficient to adopt the terms of the new policy (*e*). *Enlayde* v. *Roberts* must be regarded as overruled; although the Court of Appeal have not expressly said so Roche, J., of whose judgment they did not disapprove, showed clearly that he was not prepared to follow it (*f*). If these conclusions are justified the lessee who has covenanted to insure against fire in general terms need not go outside the standard policies. If he was limited to a particular company or group of companies his position will be even stronger, unless, of course, at the time of the lease it was their custom to include those risks within their cover. But even if this was so he will not be bound to go elsewhere if they later narrow the scope of their policies.

In both the cases referred to there was no express mention of "war risks"; the Court was concerned solely with the interpretation of the covenant to insure *against fire*. It would seem that there is no hope for the tenant who has specifically covenanted to insure against fire or damage caused by war risks. Such policies are not illegal—though the advertisement of certain kinds of insurance is now prohibited (*g*), and it is not the policy of the

(*c*) At p. 56. (*d*) *Per* Scrutton, L.J., at 59.
(*e*) *Per* Warrington, L.J., at 56.
(*f*) *Upjohn* v. *Hitchens* (1918), 34 T. L. R. 78.
(*g*) Restriction of Advertisement (War Risks Insurance) Act, 1939 (2 & 3 Geo. 6, c. 120).

common law to relieve persons who have entered into an obligation merely because they subsequently discover the difficulties they have created for themselves. It may be that the covenant would be frustrated if it *subsequently* became impossible to obtain such cover : see *Moorgate Estates, Ltd.* v. *Trower* (*supra*).

Before leaving Part I it is pertinent to observe that there is no obligation upon a mortgagee in possession to give notice to the mortgagor if the property suffers war damage, though both tenant and mortgagor in possession must give such notice to landlord and mortgagee respectively (*e*).

In Part II a number of points call for comment. The essential complexity of the whole has already been contrasted with the much simpler provisions relating to agricultural and mining leases (though it may be noticed in passing that the Court will only have jurisdiction in respect of the latter if " *buildings* or *works* are unfit by reason of war damage " ; it is not beyond the bounds of possibility that agricultural land in particular should be rendered absolutely useless for some time by a large scale gas attack from the air, but in such a case the tenant will have to bear the whole of the loss).

Some of the problems which it is thought will arise in the working of this Part will be discussed later in this article. Before they can be satisfactorily dealt with it is necessary to draw attention to the fact that not only are agricultural and mining leases outside the scope of the detailed provisions of Part II but there are very special provisions relating to ground and multiple leases which give rise to difficulties of their own.

These difficulties lie principally in the fact that in the case of ground and multiple leases an application to the Court is often necessary before the rights of the parties can be worked out. Thus to take first the case of the multiple lease,—the definition of which does not embrace the ordinary lease of a flat in a large block (*f*)—it is provided by section 15 that " section 6 of this Act shall not apply " (*g*), and also that where a notice of disclaimer or a notice to elect is served any person interested (*h*) may apply to the Court to determine whether the tenant should be allowed to disclaim the lease wholly or in part. Now this is all very well when there is no doubt that the lease is a multiple lease, but without being able to give an instance immediately I make so bold as to

(*e*) S. 2.

(*f*) S. 24: " A lease comprising buildings which are used or adapted for use as two or more separate tenements."

(*g*) This prescribes the normal procedure in the case of other leases for applying to the Court to decide whether the property is in fact " unfit by reason of war damage ".

(*h*) As defined in s. 15 (2) (a) and (b).

forecast that a case is bound to arise in which it is not possible to answer this question with absolute certainty. Where a notice to elect is served upon a tenant who believes that his lease is a multiple lease his obvious course if he wishes to disclaim the whole is to serve a notice of disclaimer in the usual way and to leave it to the landlord to apply to the Court if he is so advised. If, however, the tenant desires to disclaim part only of the premises comprised in his lease he will have to apply to the Court under section 15, for there is no machinery elsewhere in the Act to enable him to limit the effect of his notice of disclaimer which is usually all-embracing in its scope. But this application will prove to be a sheer waste of time if the Court ultimately decides that the lease is not a multiple lease at all. The tenant may then apply under section 15 (3) (b) for an extension of his time for serving a notice of disclaimer of the whole of his lease in the usual way, but in this event he will remain liable for rent until this notice takes effect (*hh*). To avoid the danger of having to pay rent during this intervening period it is thought that the tenant would be well advised on receipt of the notice to elect to serve a notice of disclaimer as well as to apply to the Court, thus protecting himself in either eventuality.

It is most curious to observe that there is no machinery whatsoever by which a tenant can in the first place limit the effect of a notice of disclaimer or of a notice of retention to part only of the premises comprised in a multiple lease. If the war damage is confined to part of the property comprised in his lease he must either make up his mind to risk retaining or alternatively disclaiming the whole, or he must wait until he receives a notice to elect, when he may apply to the Court for leave to disclaim as to part only. The obvious disadvantage of the latter course is that he will remain liable for rent, while the advantage of serving a notice of disclaimer is that the landlord *may* apply under section 15 to confine its operation to part only of the premises : but the tenant cannot count upon his making such an application.

From the landlord's point of view the position is not quite so unsatisfactory; but if he receives a notice of disclaimer of what he believes to be a multiple lease he may either at once assume all liability to repair by serving a notice to avoid disclaimer or he may apply to the Court to limit the effect of his tenant's disclaimer. It will obviously be impossible to do both of these things at once, so the landlord who decides to apply to the Court for a partial disclaimer but who fails on the ground that the lease

(*hh*) S. 8 (2).

is not a multiple lease after all must then apply for leave (*i*) to serve his notice to avoid disclaimer out of time.

In deciding whether or not to allow partial disclaimer the Court is directed to consider whether it is "equitable" to do so (*j*); at this stage it may be possible to urge the rights of assignors and mortgagees who are probably entitled to apply and to be heard under section 15 (2) (b).

The problems raised by section 13, which deals with ground leases, are even more troublesome. The definition may give rise to difficulties (*k*) and it must not be forgotten that a multiple lease which is also a ground lease is regarded for the purposes of the Act as being solely a ground lease (*l*).

Here also there is no means of determining in advance whether or not any particular lease is a ground lease; yet it will be most important to do so, for where a notice of retention or a notice to elect is served, or a notice of disclaimer is served otherwise than under an order of the Court, it shall be of no effect (*m*). The framers of the Act have wisely provided that every lease shall be presumed not to be a ground lease until the contrary is established as a result of an application to the Court (*n*) and that the time for replying to such notices may be extended if the Court should decide that the lease is not a ground lease after all (*o*). But no provision is made for the rent which will accrue during the intervening period before the application can be heard.

Let us now consider the different possibilities in the case of a ground lease.

First the tenant may wish to retain. Any notice of retention which he may then serve will be of no effect (*p*), but only if the landlord applies to the Court and the latter so decides (*q*). As the tenant will achieve no result by serving such a notice except to take upon himself the obligation of making the land fit (*r*), it is thought that he will usually be content to sit back and do nothing, secure in the knowledge that he is then

(*i*) S. 15 (3) (9).
(*j*) S. 15 (3).
(*k*) "A lease at a rent (or where the rent varies, at a maximum rent) which does not substantially exceed the rent which a tenant might reasonably have been expected, at the commencement of the term created by the lease, to pay for the land comprised in the lease, excluding any buildings, for a term equal to the term created by the lease."
(*l*) S. 15 (1).
(*m*) See s. 13 (2).
(*n*) S. 14 (3).
(*o*) S. 14 (2).
(*p*) S. 13 (1).
(*q*) S. 14 (3).
(*r*) S. 10.

under no obligation to repair the war damage (*s*). Secondly, he may desire to disclaim; in this event he may apply to the Court for leave to serve a notice of disclaimer under section 13 but must realise that during the interval his rent will continue to fall due. It would therefore be wiser to serve an ordinary notice of disclaimer in the usual way leaving it to the landlord to apply if he wishes on the ground that the lease is a ground lease, for it has already been pointed out that the notice will be valid until the contrary is decided by the Court (*t*). Thirdly, if a notice to elect is served the tenant may, if he does not wish to take advantage of the war damage, apply to the Court under section 14 to have the notice declared of no effect. The landlord will then be left with a valid lease and the right to rent, but this may not console him for the loss of the buildings at the end of the reversion, for the tenant will be under no obligation to replace them. If the tenant wishes to disclaim he should do so at once so as to save rent—no application to the Court would be needed, for the landlord by serving the notice to elect has tacitly admitted that the lease is not a ground lease. Should the tenant desire to retain he must not forget that, in the case of a ground lease, he has two alternatives : one is to serve a notice of retention in the normal way under section 4, in which case he takes upon himself an implied obligation to render the land fit. The other and more attractive alternative is to apply under section 14 for a declaration that the notice is of no effect. The tenant will then be able to retain his lease without incurring any obligation to the landlord in respect of the war damage.

Before, however, selecting any one of these courses the tenant must also consider his position with regard to any sub-tenants.

Where the reversion has been severed and the property suffers war damage, problems arise which seem almost insoluble. It is difficult to see how either of the owners of the distinct parts of the severed reversion can serve a notice to elect, or a notice to avoid disclaimer, except together with the other, for it is thought that such notices must relate to the whole lease (*u*); from the tenant's point of view this seems to render double notices necessary.

It has already been remarked that there are potential difficulties in the definition of "war damage" and attention is now directed to the fact that the occurrence of war damage will

(*s*) S. 1.
(*t*) S. 14 (3).
(*u*) Cf. *Re Bebington's Tenancy, Bebington* v. *Wildman*, [1921] 1 Ch. 559. There does not seem to be anything in s. 140 of the Law of Property Act, 1925, which would be of assistance here, although *Bebington's Case* is now rendered obsolete by it: see *Smith* v. *Kinsey*, [1936] 3 All E. R. 73.

not of itself bring Part II of the Act into force unless the result is to render the land "unfit" (*x*) and that the effect of serving a notice to retain is to imply into the lease a covenant that the land shall be rendered fit (*y*). Guarantors of the lease are not to be affected by any such implied covenant (*z*) (though they do obtain the benefit of Part I which nullifies any express or implied obligation to repair war damage (*a*)) but nothing whatsoever is said about an assignor. He will have no say in deciding whether a notice to disclaim or retain shall be served, yet, since the effect of the latter is to imply into the lease to which he was a party a covenant to render the land fit, it is thought to be almost certain that he would be held bound by it. If the cost of this work proves too great for the assignee or he fails for some other reason (or indeed if he is unscrupulous or perhaps merely thoughtless or ill-advised) the result may be disastrous to the assignor. It is suggested that to guard against this danger it would be wise to attempt to insert into the lease a clause exempting the lessee from any such liability in the event of an assignment, but since this will for many reasons be impracticable some measure of protection may be gained by requiring the assignee as a condition of the assignment to agree not to serve a notice of retention without the consent of the assignor and to give the latter immediate notice of the receipt of a notice to elect, for failure to reply to this within a period of one month (*b*) usually operates as a notice to retain (*c*).

The assignor is equally badly placed if his assignee elects to disclaim. It is well-settled law that the personal covenant in a lease is independent of the estate created by it (see *Att.-Gen.* v. *Cox* (*d*)) with the result that if the trustee in bankruptcy of the assignee disclaims under the Bankruptcy Act the lessee (assignor) will remain liable for the rent to the lessor (*Hill* v. *East and West India Dock Co.* (*e*)). This principle was recognised in cases decided under the special powers contained in section 2 of the Courts (Emergency Powers) No. 2 (Amendment) Act, 1916 (*f*), which gave the Court power to adjudicate on, and even to discharge leases, where the tenant had joined the forces. In *Revill* v.

(*x*) Defined in s. 24.
(*y*) S. 10 (1) (a).
(*z*) S. 10 (1) (a) (guarantors of the tenant), s. 11 (a) (guarantors of the landlord).
(*a*) S. 1 (4).
(*b*) The period is sometimes extended: s. 5.
(*c*) S. 4 (4).
(*d*) 3 H. L. C. 275.
(*e*) 9 App. Cas. 448.
(*f*) 6 & 7 Geo. 5, c. 18.

Bethell (*g*) the Court of Appeal declared that the release of the tenant under this section would not relieve an assignor unless the Court expressly so ordered, but it was also decided that the Act was wide enough to confer power to make such an order in a suitable case : *Tozer* v. *Viola* (*h*).

Nor is there anything in the Act to relieve the original lessee who has assigned his term from his liability to pay rent until his personal covenant expires; if the assignee exercises his option under the Act and serves a notice of disclaimer on the landlord the latter can still turn to the assignor for the rent (*i*). On the other hand, it is also true that a disclaimer, whilst discharging the lease, will not in any way affect the assignee's implied covenant to indemnify the assignor against any liability arising under the lease. The former, though released from his direct liability to the landlord will therefore remain indirectly liable to him, through the assignor (the original lessee) for the whole of the future rent.

Further questions of interest to the lawyer, though fraught with danger for the client, will arise where there are joint tenants. The practice of insisting on both husband and wife executing the lease has long been in use by landlords to defeat the device of vesting hire-purchase agreements in the wife who, if she were not a tenant, could claim them in a distress under the Law of Distress Amendment Act, 1908 (*k*). Will a notice of disclaimer served by one of several joint tenants be effective to discharge the rest? It is thought that it will : " there is only one tenancy and that is discharged " said Eve, J., in *Daniell* v. *Carter* (*l*), where a lease containing a joint and several covenant by husband and wife had been discharged by the Court on the ground that the husband had entered the army. But is the converse also true? Will a notice of retention served by one tenant take effect to bind all the others? It has been held that relief under section 146 of the Law of Property Act, 1925 (*m*), cannot be granted to one of two joint tenants (*n*). And what if each of two joint tenants serves a different notice? Presumably the first to be served will take effect.

The exact relation of the implied covenant to render fit to the

(*g*) [1918] 1 K. B. 638.
(*h*) [1918] 1 Ch. 84.
(*i*) The wording of the Bankruptcy Act, 1869, on which *Hill* v. *East and West India Dock Co.* (cited *supra*) was decided, was precisely similar to that in the Landlord and Tenant (War Damage) Act, 1939—" shall be deemed to have been surrendered ".
(*k*) 8 Edw. 7, c. 53.
(*l*) [1918] W. N. 380.
(*m*) 15 Geo. 5, c. 20.
(*n*) *T. M. Fairclough & Sons, Ltd.* v. *Berliner*, [1931] 1 Ch. 60.

ordinary covenant to repair is nowhere explained. In particular it is uncertain whether the statutory covenant can be brought within the scope of the Landlord and Tenant Act, 1927 (*o*), or the Leasehold Properties Repairs Act, 1938 (*p*). It is true that if the tenant does not perform his covenant within a reasonable time the landlord may apply to the Court and the Court may, on the application of the landlord, declare the tenant once more liable to pay rent, but it is believed that one great objection to the Act is that it gives the landlord no right to recover, and the Court no power to order the return of, possession on the ground either of war damage or of failure to render the land fit, except where the lease in question is a ground or multiple lease (*q*). In the result a landlord whose leasehold property has suffered war damage, although he may enter to do repairs under section 2, cannot recover possession except by the clumsy and dilatory process of a notice under the Law of Property Act, 1925 (s. 146) (*m*) and an action of ejectment.

Section 2 gives the landlord the right to enter and carry out repairs, but this will result in his making a free gift to the tenant, for the lease will still remain valid and effective.

The landlord who does not wish to repair war damage for his present tenant—perhaps because he feels that he ought to be entitled to charge a higher rent in view of the additional expenditure, or possibly because the repairs would inevitably enhance the value of the property—is faced with a dilemma. If the tenant is willing to repair himself no sympathy need be wasted on the landlord; the tenant will either serve a notice to retain or, by failing to reply to a notice to elect, will be deemed to have done so (*r*). The landlord's difficulties only become apparent if the tenant does not wish to assume this liability or does not honour it. If the tenant disclaims all will be well, but if he merely does nothing the landlord is faced with a terribly dilatory procedure. If he first serves a notice to elect, non-compliance with this by the tenant will result in the latter being deemed to have elected to retain. The landlord must then wait for a reasonable time (without any rent : section 10) and then, if the tenant has not honoured his obligation, he may (a) apply to the Court for an order that rent be once more payable (it is doubtful whether such an order may be made retrospective (*s*)); and (b) he may serve notice of breach of covenant under section 146, Law of Property Act, 1925 (*m*). A further delay will

(*o*) 17 & 18 Geo. 5, c. 36.
(*p*) 1 & 2 Geo. 6, c. 34.
(*q*) See s. 16.
(*r*) S. 4.
(*s*) S. 10 (1) (b).

then ensue before proceedings for possession may eventually be started. No leave under the Courts (Emergency Powers) Act (*t*) will be required, but in cases to which the Leasehold Property (Repairs) Act, 1938 (*u*), applies the landlord has yet another hurdle to face—the tenant may, by serving a counter-notice, force him to apply to the county court for leave to proceed! Many of these difficulties will be overcome if the landlord does not serve a notice to elect, for the tenant will remain liable for rent, and if he fails to pay possession may be claimed on this account unless, of course, leave to proceed (which will be necessary (*x*)) is refused.

There is no space to speculate on the contingencies which may arise in the application of the Act to statutory tenancies, but there is nothing in it to exclude the tenancy created by the Rent, etc., Restrictions Acts.

I have already expressed my grave doubt whether the implied obligation imposed by the Housing Act, 1936, can be regarded as an obligation to repair; it remains to point out that the best remedy open to the landlord of restricted property would appear to be to wait until the tenant has defaulted in his rent and then apply for possession under the 1933 Act (Sched. III).

In its practical application the Act may give rise to some startling results: for instance, let us imagine shop property let by "landowner" to "tenant" at a rent which is not low enough to render the lease a ground lease and sub-let by "tenant" at a profit to "sub-tenant" who is in actual occupation.

The property suffers war damage. It is the immediate duty of "sub-tenant" to give notice to "tenant", who will in his turn be bound to pass it on to "landlord". "Tenant" will obviously not wish to decide on what course he is to follow until he knows what in his turn "sub-tenant" is prepared to do. So long as nothing is done each is liable for rent in the usual way. If "landlord" serves a notice to elect "tenant" will almost always be wise to refrain from answering it until he has himself served a similar notice on his sub-tenant and waited for his reply.

The sub-tenant perhaps, in reply, serves a notice to retain, thereby making himself liable to render the land fit; the tenant, however, will be wise not immediately to serve a similar notice on "landlord", for if "sub-tenant" fails "tenant" will have to fulfil the obligation himself. Supposing, therefore, that "tenant" decides to disclaim and does so within the specified time; what

(*t*) 2 & 3 Geo. 6, c. 57.
(*u*) Leases at less than £100 a year with at least five more years to run. 1 & 2 Geo. 6, c. 34.
(*x*) Courts (Emergency Powers) Act, 1939, ss. 1, 3.

is the result? His disclaimer does not affect "sub-tenant", provided the latter is in occupation (*y*); but it forces the landlord to choose between himself serving a notice to avoid disclaimer or accepting the notice of disclaimer. If "landlord" chooses the former alternative "tenant" will find himself in the fortunate position of being entitled to call both on "sub-tenant" and on "landlord" to render the land fit, for both will then be bound by implied covenants to do so. On the other hand, if "landlord" accepts the notice of disclaimer he will still not be rid of "sub-tenant", but he will have no contractual rights against him, and the latter, though bound by an implied covenant to render the land fit, may snap his fingers at it, for the only person entitled to enforce this covenant is "tenant" and he, as a result of his disclaimer, can no longer prove any damage to his reversion to justify a claim for damages (*z*).

It is fair to the draftsman to point out that he has not overlooked the last difficulty, for he has given the Court power, on the application of any person interested (*a*), to create new terms or vary the effect of existing terms as the Court thinks just after a disclaimer has taken effect.

PROPERTY AND THE WAR.

By E. O. Walford, LL.D., Solicitor.

II.

Since the previous article in this series was written the case of *Moorgate Estates, Ltd.* v. *Trower and Another*, [1940] 1 A. E. R. 195, has been decided. That case does not clear up the question whether a covenant to insure against damage by fire binds the covenantor to obtain a fire policy under which war risks are covered whilst such cover is in fact unobtainable. As was pointed out in the previous article there is considerable authority for the view that where a man binds himself by contract to do that which turns out to be impossible, he will be held to his bargain and will have to pay damages for his failure to perform his obligation. The *Moorgate Estates Case* shows that where the mortgage expressly provides that cover against war risks is to be taken by the borrower and such cover *can* be taken at the date when the mortgage is

(*y*) S. 8 (2) (b).
(*z*) Landlord and Tenant Act, 1927 (17 & 18 Geo. 5, c. 36).
(*a*) S. 9.

executed it is no excuse to show that at a later date it was impossible to continue the insurance. It was there pointed out that the lender might well have been relying upon cover against war risks being obtainable; and that it would therefore have been inequitable to absolve the borrower from his obligation to cover such risks. The practical aspect of the question was that if the failure to cover war risks was a breach of covenant the borrowers were entitled to call in the mortgage; but unless there was a breach of covenant they could not call in the mortgage until 1946.

Vendor and Purchaser.

If we were to confine our remarks to the effect of war on contracts for the sale of freehold or leasehold property, little could be said. Normally, when the contract has been entered into the property is at the risk of the purchaser. If buildings on the land which has been purchased are destroyed by fire, acts of God, King's enemies, or otherwise howsoever the loss is that of the purchaser. Prior to the present war it was considered that the only substantial risk was destruction or damage by fire. The purchaser's solicitor considered that if insurance against that risk was effected on behalf of his client his duty was discharged. War damage does not "frustrate" the contract; *vide infra*, under "Sale of Freeholds".

Condition as to War Damage.

It is by no means clear that the lay purchaser generally appreciates that the property is at his risk from the date of the contract. Indeed, the contrary is probably true. It is, therefore, worth considering whether at the present time the purchaser should be protected by a condition under which he may rescind the contract if the land or the buildings on it should be damaged by military operations. It is not difficult to imagine that a purchaser who had agreed to purchase a house would be very unwilling to pay the purchase price in full in exchange for a piece of land with débris upon it. Yet it is obvious that this is all that the purchaser would get for the purchase price if the house were destroyed. An intelligent critic has suggested that there is no more reason for leaving the risk with the vendor between contract and completion than there would be in saddling the vendor with the risk until the war has ended. But this suggestion hardly seems justifiable. The purchaser expects, on completion, to obtain the property which he has agreed to buy. But once he has paid the price and been put into possession of the property which he agreed to buy the plain man realises quite well that the property will then be his "for better or worse". It will be interesting to see whether

a practice arises during the war of leaving the property at the risk of the vendor, so far as concerns war damage, until the date fixed for completion. The framing of a suitable clause presents difficulties. Slight damage should not be a ground for the rescission of the contract if the vendor is willing to make good that damage speedily, or to make suitable compensation. On the other hand, a clause providing for compensation opens up possibilities of prolonged disputes, or arbitration concerning the amount to be paid. An intending purchaser will hardly wish to be saddled with a contract the outcome of which may not be known for many months. On the whole it would seem better to omit any provision for compensation. The following clause might be suitable :—

> **"If war damage shall occur to the property hereby agreed to be sold prior to or on the date fixed for completion (but before actual completion) then unless such damage is made good within [three] weeks from the date fixed for completion the purchaser may at any time after the expiry of the said period of [three] weeks rescind this agreement whereupon the vendor will cause to be returned to the purchaser forthwith any deposit[s] paid by him [together with any moneys paid on account of the purchase price]."**

Admittedly such a provision is by no means perfect. The damage might have occurred without the purchaser's knowledge and he might complete the purchase. Presumably it would be fraudulent for the vendor to suppress the fact that war damage had occurred; but an express agreement by the vendor to inform the purchaser forthwith of any such damage would, no doubt, be better. Again, the vendor might also be unaware of the damage. Another possibility is that completion might be delayed owing to the vendor's own default, in which case the property will after the completion date be at the risk of the purchaser although he will not be let into possession of the property. It must be for the parties to decide whether such possibilities should be covered in the contract. The important point is that the parties should understand the position.

Position Apart from Contract.

(a) *Sale of Freeholds.*

Whilst laymen may be unaware that property agreed to be sold is at the risk of the purchaser from the date of the contract (*vide infra*), and the Roman law afforded some relief to the purchaser

in the event of serious damage occurring to such property between contract and completion, the rule at common law has always been that the purchaser must bear the loss if buildings on the land or the land itself, should be damaged or become less valuable owing to some unforeseen event, such as lightning, flood, earthquake, or other act of God, or destruction by King's enemies, or the engulfing of the land by the sea : *Cass* v. *Rudele* (1693), 1 Eq. Cases Abr. 25, pl. 8; *Poole* v. *Shergold* (1786), 1 Cox 273. It may conceivably be shown that the property was purchased upon an implied condition that the property should be, or remain in a certain state at the date fixed for completion; but it is thought that such cases must be very rare. It is doubted whether such a condition would be inferred from the fact that the vendor of business premises and the goodwill thereof had agreed to continue to carry on the business until the date fixed for completion. No doubt cases may be found in which the vendor must on the date fixed for completion at his own risk produce the property in the condition specified in the contract, or pay damages. Thus, if the vendor is to complete the erection or alteration of a building upon the land by the date fixed for completion, time to be of the essence of the contract, or is on that date to hand over the existing building fully equipped as a theatre and in a state fit for performances, he cannot escape that obligation by pleading that the premises have been burnt down, or destroyed by enemy action, *e.g.*, by bombs dropped by enemy aircraft.

Rescission.

In the case last mentioned, if the purchaser elected to rescind the contract owing to the vendor's failure to comply with his absolute contract, it would seem clear that he would be entitled to do so, since the handing over of the property in a suitable condition would clearly go to the root of the contract. In that case the purchaser can recover his deposit and any expenses properly incurred by him in discharge of any obligation imposed on him by the contract by way of *restitutio in integrum : Laughton* v. *Port Erin Commissioners*, [1910] A. C., at p. 569; *De Bernardy* v. *Harding* (1853), 8 Ex. 822; *Carlish* v. *Salt*, [1906] 1 Ch., at p. 341.

Specific Performance and Damages or Compensation.

Alternatively, the purchaser may obtain a decree of specific performance. In spite of the complication introduced by the obligation of the vendor to carry out building works the Court may decree specific performance of the contract for sale with damages for the breach of the obligation to effect the work : *Soames* v.

Edge, Johns. 669, where the purchaser was the party in default; but the principle is the same where the vendor makes default; and see *Jaques* v. *Millar* (1877), 6 Ch. D. 153, and *Wilson* v. *Northampton, etc., Ry.*, L. R. 9 Ch. 279.

The second example given above (namely the sale of a theatre which is to be fit for the presentation of performances on the completion date) would appear to be a case for specific performance with compensation : *Soames* v. *Edge*, *supra.*

In general, the Court is disinclined to grant specific performance of contracts to construct buildings or to do other works on land, whether such contracts are complete in themselves or are part and parcel of a contract for the sale and purchase of land. And if damages will sufficiently compensate the party for whom the building is to be erected, or the work is to be executed, the Court will not decree specific performance of the work (*Wilson* v. *Northampton, etc., Ry., supra*), although specific performance of the contract for the sale and purchase of the land on which the work is to be executed will be decreed, with damages in respect of the failure to carry out the work agreed upon. There are, however, cases in which damages are not a sufficient or suitable recompense to the party for whose benefit the works were to be constructed. Thus if A agrees to take a lease of land from B after he, A, has pulled down the existing building and erected a new one, and A, having pulled down the existing building, does not erect a new one, B cannot be satisfactorily compensated by damages. What he requires is (i) a lessee for a substantial term at the agreed rent; and (ii) a building on the land which will form a satisfactory security for the payment of the rent; (iii) the benefit of the reversionary interest in the land with the new building on it, and not merely a reversionary interest in the land; and moreover, it would be inequitable to refuse B specific performance of a contract for the taking of a lease merely because A had agreed in addition to do certain acts on the land and had been given possession for that purpose.

The circumstances in which the Court will enforce specifically a contract involving the execution of works appear now to be settled. It has been said that three conditions must co-exist :

(1) The exact nature of the works must be specified in or ascertainable from the contract, so that the Court can determine exactly what order should be made and thus judge whether its order is being complied with : see *Rushbrooke* v. *O'Sullivan*, [1908] 1 Ir. R. 232.

(2) The plaintiff must have such an interest in the completion

of the works that damages would not be satisfactory by way of compensation.

(3) Possession must have been given, pursuant to the contract, to the party who has agreed to execute the works; but, on this point, see the observations below.

The rule is stated as above in *White & Tudor's Leading Cases in Equity*, Vol. II, p. 441, and in *Williams on Vendor and Purchaser*, Vol. II, p. 1047, on the authority of *Wolverhampton Corporation* v. *Emmons*, [1901] 1 K. B. 515; but in *Carpenters' Estates, Ltd.* v. *Davies* (1940), L. J. Newspaper, January 13, 1940, p. 20, Farwell, J., considered that it was sufficient if the defendant had possession and did not agree that the defendant must "by the contract" have obtained possession of the land. Possession must, of course, be available to the defendant, otherwise a decree of specific performance would be useless, and would therefore not be granted: *Ferguson* v. *Wilson*, L. R. 2 Ch. 77; *Rankin* v. *Lay*, 2 De G. F. & J. 65; *Swain* v. *Ayres*, 21 Q. B. D. 289.

It may be asked whether such matters have any real connection with the effect of war or war operations upon property. The answer is that they have, for the following reason. Where parties agree upon the sale and purchase of a house to be constructed, or of land on which works are to be executed, and war damage occurs, it is likely that the party who has undertaken to carry out the work will desire to be advised whether he is remitted to the ordinary law, or whether he is excused by reason of acts of the King's enemies or even of war operations conducted on behalf of the Crown. And the reply to such inquiries is that where a party has by his contract undertaken an absolute obligation, which is not unlawful, he must at his peril perform it or pay damages. Moreover, if damages are inadequate compensation to the other party he may, subject to the conditions above stated, be ordered to execute the works in accordance with his undertaking. But in the normal case of a contract for sale of land on which a house is to be erected or other works are to be executed, it will be appreciated that damages *will* generally be sufficient, for the purchaser will be able to execute the necessary works himself if furnished with the appropriate moneys.

It cannot be too strongly emphasised that the decisions in connection with the discharge of the contract by "the destruction of the subject-matter of the contract", "impossibility of performance", and "frustration of the common adventure" do not apply to cases in which A agrees to complete and hand over on the completion date a building or other works in a specified condition. If the "subject-matter" whilst in course of erection, or even

after its completion, is destroyed by fire, war damage, act of God, or inevitable accident, A must do the work again or pay the penalty for non-performance, as if he had made wilful default : for (so it is said) he might have safeguarded his position by the terms of the contract. The Landlord and Tenant (War Damage) Act, 1939, s. 1, exempts persons who have, in any disposition creating or transferring any interest in land, contracted to do any *repairs* in relation to the land from liability to make good any war damage to the land; but a contract for the erection or completion of a house does not appear to be a contract " to do repairs ". In *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, the frustration of the contract was based on an implied condition as to the *continued* existence of a building at which certain entertainments were to be performed. If the owner of the property had agreed to erect on the land buildings by a certain date, instead of agreeing to permit the use of existing buildings, he would not have been excused if fire or other accident had prevented him from complying with his obligation by the due date, as will appear from the following case. Premises were damaged by fire, and the insurers, having the right to make compensation in money or to reinstate the premises, elected to reinstate them. Before the necessary work could be done a competent authority ordered that the property be demolished because of its dangerous condition. The insurers were held bound by their election, and were therefore liable to reconstruct the property or pay damages on that basis : *Brown* v. *Royal Insurance Co.* (1859), 1 E. & E. 853. (It seems difficult to reconcile this case with *Appleby* v. *Myers* (1867), L. R. 2 C. P. 651; but neither case appears to have been challenged by subsequent decisions. In the *Appleby Case*, however, the existence of certain machinery on which the work was to be done was *essential*. In the *Brown Case* the work to be done was merely increased—very substantially, it is true.) If further authority is required for the observations here made the reader may be referred to *Pollock on Contracts*, 10th ed., pp. 285—287. One extract must suffice here. " If a man may bind himself to do something which is only not known to be impossible, much more can he bind himself to do something which is known to be possible, however expensive and troublesome; and it will make no difference, provided that his promise was really unqualified, if performance turns out not to be practicable in the manner contracted for, or at all. Nor does it matter whether the impediment exists at the date of the contract, or arises from events which happen afterwards " : *ibid.*, p. 285 (citing *Atkinson* v. *Ritchie* (1809), 10 East 530).

But let us assume that in relation to a contract for the sale

of a property, with or without an additional provision as to the execution of works, there is an express or implied condition that the existing property shall remain in its present condition. We have seen from the observations in the previous article in this series that upon discharge of the contract (upon non-compliance with the condition), the loss will lie where it falls. And the result will be that if the purchaser has paid a deposit to the vendor or made a payment on account of the purchase price or has incurred other expenses *he will not be able to recover such payment or expenses* (*a*). For this reason it is unsatisfactory to provide merely that it is an absolute condition (*b*) of the agreement that a given event shall happen or that a given condition of affairs shall exist at the date fixed for completion *unless* it is also stated that the purchaser is to receive back his deposit and his expenses in connection with the contract and the investigation of title; or as may be agreed. Otherwise the guillotine may fall on the day of completion, leaving neither party the right to call for any restitution or further performance by the other party except the performance of obligations due to be discharged prior to the completion date. These must be performed notwithstanding that the party so performing them will receive nothing in exchange: *Chandler* v. *Webster*, [1904] 1 K. B. 493; *Civil Service Co-operative Society* v. *General Steam Navigation Co.*, [1903] 2 K. B. 756.

(b) *Sale of Leaseholds.*

The observations made above concerning freehold property apply with equal force to the sale of leasehold property, with the following exception. The vendor under an open contract for the sale of a leasehold property is under the obligation of performing and observing the lessee's obligations up to the date when a good title is made, or if a date is fixed for completion then up to that date: *Re Highett & Bird*, [1903] 1 Ch. 287; *Dowson* v. *Solomon* (1859), 1 Drew. & Sm. 1; *Palmer* v. *Goren* (1856), 25 L. J. Ch. 841. What is the position if war damage occurs to the land? Section 1 of the Landlord and Tenant (War Damage) Act, 1939, is clearly applicable. By that section it is provided that "where by virtue

(*a*) It is considered that if the deposit is paid to a stakeholder it is returnable to the vendor as it was only to be paid to the vendor on completion; and it would seem that (for the same reason) the position will be the same if the payment is made to the stakeholder "as a deposit and in part payment of the purchase price".

(*b*) *I.e.*, a condition without warranty Admittedly the terms "condition precedent" and "warranty" are sometimes treated as synonymous. The use of the term "condition" is always to be avoided in such a connection, unless the contract also states precisely what is to happen if the condition is not performed.

of the provisions (whether express or implied) of a disposition or of any contract collateral thereto an obligation . . . is imposed on any person to do any repairs in relation to the land comprised in the disposition, those provisions shall be construed as not extending to the imposition of any liability on that person to make good any war damage occurring to the land so comprised". And for this purpose a "disposition" means "any instrument (including an enactment) or oral transaction, whether made before or after the commencement of this Act, creating or transferring an interest in land". In other words obligations to repair arising under any documents creating or transferring interests in land are to be read as if repairs necessitated by war damage were excluded. "War damage" means "damage caused by, or in repelling, enemy action, or by measures taken to avoid the spreading of the consequences of damage caused by or in repelling enemy action": section 24.

Thus, if A sells to B a leasehold property which is destroyed by a bomb, dropped from a German aeroplane during the present war, before the date fixed for completion he will have two answers to any demand by the purchaser that the property should be rebuilt. First, that he is released by the Act just mentioned from any obligation under the lease to make good war damage. Secondly, that the contract for sale is itself a disposition within the meaning of the Act, and consequently that he is released by it from any obligation towards the purchaser in relation to the making good of war damage.

But a more serious question arises in connection with the vendor's obligation to keep the demised premises insured against damage by fire.

If a lessee agrees to insure against damage by fire this is *prima facie* to be construed as an undertaking to insure against damage by fire howsoever caused. Therefore, although it is the custom of all tariff insurance offices to exclude liability in the case of fire caused by invasion, foreign enemies and explosions, it does not follow that the lessee discharges his obligation by taking out a tariff office policy. Indeed, during the Great War a case occurred in which this very point arose. In that case the landlord had covenanted to insure against fire, and had taken out the usual policy excluding war risks. During the early part of the war it was impossible to obtain cover against war risks. Later it became possible to do so; but the lessor failed to take the additional cover against such risks. He was held liable on the covenant: *Enlayde, Ltd.* v. *Roberts*, [1917] 1 Ch. 109. On the other hand, a covenant to insure against fire in a named office is fulfilled by taking out a fire policy in the standard form issued by that office, if that office is not issuing

policies covering the additional fire risk in question: *Upjohn* v. *Hitchens*, [1918] 2 K. B. 48.

But suppose that it is impossible at the date of the lease and at all material times thereafter to obtain cover against fire caused by war damage, and after contract for the sale of the lease an incendiary bomb, dropped by an enemy aircraft, destroys the premises. The lessee has covenanted to keep the demised premises insured against damage by fire; but, being unable to do more, has only taken out the usual fire policy excluding war risks. He has also covenanted in case of damage by fire to apply the insurance moneys in the making good of the damage, supplying any deficiency out of his own moneys. Such a covenant, although having a close connection with the covenant to repair, does not appear to be touched by the Landlord and Tenant (War Damage) Act, 1939. Has the vendor of the leasehold property in question any answer to the purchaser's demand that he should make good his default in effecting the requisite cover by supplying the costs of reinstatement? There is no certain answer to this question. Here we are not dealing with a case in which the performance of the contract *becomes* impossible; it is a case of original impossibility.

It is apprehended that when the Buckmaster Committee stated in its Report (Command 6100, p. 4) that *prima facie* if a man binds himself by contract unconditionally to do that which *turns out* to be impossible he will be held to his bargain and have to pay damages for his failure to perform, they were referring to cases of supervening impossibility. There is *some* authority for the proposition that a contract to do something which is obviously impossible, *e.g.*, to jump over the moon, is void. But whether a contract which is in fact (but not obviously) impossible of performance is void is another question. Here, it can only be pointed out that if one of the obligations of one of the parties is void for original impossibility, but the contract is otherwise held to remain in force injustice may result to the other party. As the law stands at present the Court cannot vary or modify the terms of a contract. If the inability of one party to perform one of his obligations results in the discharge (by frustration) of the contract the whole contract is discharged, but each party is entitled to keep what he has received or to get what he ought to have received before the frustrating event took place. In the case of a lease where performance is due immediately upon the grant of the lease and is then impossible, the Court would appear to have no power to take away from the lessee the term which has been granted to him if the "contract of lease" is treated as discharged.

As between the vendor and purchaser of the leasehold interest, in the circumstances stated above, it is therefore clear that if the vendor is bound at his peril to keep the property insured against *all* fire risks, he will be in a sorry position. If he is discharged by reason of impossibility so also is the intended assignee; but if the purchaser has paid a deposit to the vendor and not to a stakeholder the vendor will keep it for his own benefit! Moreover, if the assignment has been completed the purchaser would appear to be without remedy.

The situation is a peculiar one, and it can only be hoped that the Courts will adopt a benevolent construction of the fire insurance covenant, both as between lessor and lessee and as between assignor and assignee, and will hold that a covenant of this kind is to be construed in a business sense, namely, to insure by means of the usual policy issued by the tariff offices or of Lloyd's, *so long as* insurance, properly so called, cannot be obtained against damage by fire arising from war risks. Having regard to the observations of the Court of Appeal in *Upjohn* v. *Hitchens*, *supra*, it is not felt that the decision in *Enlayde* v. *Roberts*, *supra*, presents an insuperable obstacle. But see further the observations on the *Moorgate Estates Case* at the commencement of this article.

Aliens.

(1) *Former Position.*

We propose at first to ignore all distinctions between friendly and enemy aliens and to consider the position of aliens generally in relation to property.

In earlier days an alien could not hold lands in England for his own benefit. The law was thus stated by Blackstone, writing in the eighteenth century: "Aliens also are incapable of taking by descent, or inheriting: for they are not allowed (*sic*) to have any heritable blood in them; rather indeed upon a principle of national or civil policy, than upon reasons strictly feodal. . . . Wherefore if a man leaves no other relations but aliens, his land shall escheat to the lord": Bl. Comm. II, 249. He also observes that as aliens "can neither hold by purchase, nor by inheritance, it is almost superfluous to say that they can have no heirs".

(2) *Present Position.*

But the rigour of the law was relaxed in the nineteenth century, and now aliens have, with a few exceptions, as full rights of purchasing, holding, and disposing of real and personal property as if they were British subjects.

Their position is defined in this respect by the British Nationality and Status of Aliens Act, 1914, s. 17. The words of the section are as follows :—

"Real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through from or in succession to an alien, in the same manner in all respects as through from or in succession to a natural-born British subject.

Provided that this section shall not operate so as to—

(1) confer any right on an alien to hold real property situate out of the United Kingdom; or

(2) qualify an alien for any office or for any municipal, parliamentary, or other franchise; or

(3) qualify an alien to be the owner of a British ship; or

(4) entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him; or

(5) affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the twelfth day of May, eighteen hundred and seventy, or in pursuance of any devolution by law on the death of any person dying before that day."

(3) *Aliens Orders.*

In the same year in which the British Nationality and Status of Aliens Act was passed the Aliens Restrictions Act, 1914, also became law. It is not proposed to deal at length with that Act, as it had little or no relation to the sale of property. It provided for the making of Orders in Council prohibiting the landing or embarkation in the United Kingdom of aliens, for the deportation of aliens, and generally the restriction of the activities of aliens in the United Kingdom. It is applicable to all aliens, and was amended by the Aliens Restriction (Amendment) Act, 1919 (*c*). Various orders have been made under these Acts of 1914 and 1919 which are now printed in consolidated form by H.M.

(*c*) This Act restricted the acquisition by former enemy aliens (as therein defined) of any interest in land and in certain other classes of property during a period of three years from December 23, 1919.

Stationery Office. Articles 9 and 9A appear to be the only parts of the Order which have a bearing upon property. Article 9, which refers to protected areas, empowers the Secretary of State to impose conditions (*inter alia*) as to the acquisition by aliens (whether enemy aliens or not) of land or any interest in land within such an area. Article 9A, which is confined to enemy aliens, prohibits such aliens from having in their possession or under their control in the United Kingdom certain articles, such as explosives, cameras, nautical charts, etc. The list includes motor cars and motor cycles and also " more than three gallons of inflammable liquid ", a point of interest now that petrol is rationed. For the purposes of the Aliens Orders " enemy alien " means a person who, not being either a British subject or a British protected person, possesses the nationality of a State at war with His Majesty : Aliens Order, 1920, para. 20. By Statutory Rules and Orders No. 1058 of 1939 a woman who, having been a British subject, is an alien by intermarriage with an alien is, if an *enemy* alien, deprived of the exemption from Article 6 of the Aliens Order, 1920, granted to her by the Direction dated February 3, 1933. Order 1058 applies to such women only if they were enemy aliens on September 1, 1939. Thus, subject to the slight limitations mentioned above, the subjects of all foreign States can in peace-time hold and deal with real or personal property in England as freely as British subjects. During war-time even *enemy* aliens would continue to enjoy the same privileges but for the fact that emergency legislation deprives them of their rights to a very large extent. At the same time if and so far as no enactment (or Order or Regulation made under it) takes away those rights they remain exercisable. They are not automatically deprived of them or of any real or personal property which they hold upon the outbreak of war.

(4) *Who are Enemy Aliens?*

We have already seen that the Aliens Order, 1920, contains a definition of " enemy alien ". This definition is in accordance with the layman's conception of an enemy alien but we should be making a mistake if we assumed that definition to be of general application in connection with the determination of the position and rights of an alien. Lord Lindley said in *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A. C., at p. 505 : " When considering questions arising with an alien enemy, it is not the nationality of a person, but his place of business during war that is important." The thought might perhaps be expressed more clearly (but perhaps not so accurately) by saying that " when

considering who is an alien enemy it is the place of his business or voluntary residence during war that is important, particularly when considering his civil rights. Notwithstanding that a person is a British subject or a neutral, yet, if he is carrying on business in enemy territory he will be regarded as an alien enemy so far as concerns dealings with him, either in the way of trade, or any other dealing". "The test of a person being an alien enemy is not his nationality but the place in which he resides or carries on business. A person voluntarily resident in, or who is carrying on business in, an enemy's country is an alien enemy" : *Porter* v. *Freudenberg*, [1915] 1 K. B. 857. But until England is at war all aliens are alien friends. If an alien friend is residing here *sub protectione domini regis* he may maintain an action in the English Courts. This was established more than 200 years ago : *Wells* v. *Williams* (1698), 1 Salk. 45. During the last war it was laid down that even during war-time a subject of a State at war with Great Britain who is duly registered under the Aliens Restriction Act, 1914 (which, as amended, is still in force), and the Order made thereunder is also *sub protectione*, and is entitled to sue and prosecute his claim in the English Courts : *Princess Thurn and Taxis* v. *Moffit*, [1915] 1 Ch. 58. During the Great War it became necessary, as a matter of public policy, to intern very large numbers of aliens who were nationals of foreign countries at war with England; but it was held that internment did not deprive them of their right to sue : *Schaffenius* v. *Goldberg*, [1916] 1 K. B. 284.

As we have already observed, a British subject residing or carrying on business in an enemy country in time of war is considered to be an alien enemy. It is unfortunate that the Courts have not considered it to be necessary to describe such persons as *alien* enemies. They are for all practical purposes subject to the disabilities of alien enemies, but it seems a little confusing to describe them as "enemies" and even more confusing to call them "aliens". They do not, of course, forfeit British nationality by such residence, nor would they be subject to criminal process (*e.g.*, as adhering to the King's enemies) solely by reason of such residence.

Apart from voluntary residence in enemy territory the case of a prisoner of war in such territory requires consideration. He is not regarded at common law as an alien enemy, at any rate where the contract is for necessaries. In one case, after the drawing of a bill by a British prisoner of war in enemy territory during war-time it was indorsed to an enemy national, resident in enemy territory, who was held entitled to recover on the bill after the

conclusion of the war : *Antoine* v. *Morshead* (1815), 6 Taunt. 237. But suppose that A is the manager in Germany of a company incorporated in England. War breaks out, and A is interned (or placed in " protective " custody) until released upon the winning of the war by the Allies. A then sues the English company for his salary during the internment period. It seems that A may be treated as an alien enemy and thus be unable to recover : *Scotland* v. *South African Territories, Ltd.* (1917), 33 T. L. R. 255. However, in the case last mentioned Darling, J., appears to have considered that A was voluntarily residing in enemy territory, since he was allowed sufficient freedom to enable him to look after his principal's business (in that case, in German South-West Africa). The position is not too clear. In the case of strict internment there would appear (in such a case) to be two possibilities—

(a) frustration of the contract owing to impossibility of performance,

(b) frustration by supervening illegality by reason of the fact that trading or business activities in enemy territory might enure to the benefit of the enemy.

But as to interests in land it does not appear from any of the decisions concerning English property agreed to be sold or purchased, let or taken on lease by alien enemies that the principle of frustration will be applied : see *The Conveyancer*, December, 1939, pp. 140, 141.

If authority be required for the proposition that an alien enemy *stricto sensu* (*i.e.*, a person carrying on business or voluntarily residing in enemy territory) cannot sue here in war-time it is to be found in *Le Bret* v. *Papillon* (1804), 4 East 502, and *Raphael Brandon* v. *Nesbitt* (1794), 6 Durn. & East T. R. 23.

Although an alien resident here may sue even if he is an enemy subject, it does not follow that it would be profitable for him to do so during the war, unless he first satisfies himself that he will be allowed to retain the fruits of his action. The pertinence of this observation will become clear upon consideration of the provisions of the Trading with the Enemy Act, 1939, *infra*.

(5) *Contracts with Alien Enemies and Rights Thereunder.*

In summarising the law affecting aliens and enemy aliens we have gone a little outside the strict sphere of property law; but it is felt that without a brief survey of the common law rules it is difficult to make intelligible the remarks which follow concerning the special legislation relating to trading with the enemy. Indeed, it is essential to deal with one more aspect of the law concerning

contracts between enemy aliens and British subjects or enemy nationals resident in England. Public policy demands that no dealings between alien enemies and persons resident in Great Britain which might result in an advantage to the enemy should take place. Accordingly all such dealings are unlawful even if they do not involve trading or cannot be brought within the term "commercial transaction": *Robson* v. *Premier Oil, etc., Co.*, [1915] 2 Ch., at p. 136; and see *per* Lord Dunedin, [1918] A. C., at p. 268. Here it becomes necessary to consider whether the contract is executory or executed.

Executory and Executed Contracts.

The term "executory" contract seems to be unexceptionable, if used to connote an agreement which has not been performed or commenced to be performed by either party but it is sometimes used to connote a contract which is only partly performed. The term "executed contract" is misleading. It is sometimes used to describe a contract under which one of the parties has, but the other party has not, fulfilled all his obligations. If a contract has been fully executed by both parties that is an end of the matter. But in point of fact a contract may well be partly executed by one or both parties; and therefore it will remain to be executed in part by one or both parties. Yet the terms "executory contract" and "executed contract" have been used in the sense above indicated in so many decisions that it must suffice here to point out the distinction.

(a) *Executory contracts*—

(i) If the performance or further performance of the contract will require intercourse with an alien enemy the contract is dissolved: *Ertel Bieber & Co.* v. *Rio Tinto Co.*, [1918] A. C. 260. If not it will merely be suspended until peace is declared (*Ex p. Bousmaker* (1806), 13 Ves. 71), unless the result would be to frustrate or alter entirely the character of the contract: *Esposito* v. *Bowden* (1857), 7 E. & B. 763.

(ii) A provision for suspending activity under the contract until the conclusion of the war will not save the contract from dissolution: *Ertel Bieber & Co.* v. *Rio Tinto Co.*, *supra.*

(b) *Executed contracts*—

(i) The enemy alien has performed his obligations and desires to enforce the contract or to claim damages for breach of it by the other party. He cannot sue until the conclusion of the war, his rights under the contract being merely suspended: *Alcinous* v. *Nigreu* (1854), 4 E. & B. 217. It will be remembered that by

"enemy alien" is meant any person British or foreign voluntarily resident or carrying on business in an enemy country.

There are old authorities to the effect that a prisoner of war in England may sue on a contract for wages or necessaries: *Sparenburgh* v. *Bannatyne* (1797), 1 Bos. & P. 163; *Maria* v. *Hall* (1807), 1 Taunt. 33; and see and compare *Alcinous* v. *Nigreu* (1854), 4 E. & B. 217, and *The Maria Theresa* (1813), 1 Dods. 303, and *The Frederick* (1813), 1 Dods. 266.

(ii) The contract has been performed by the resident in Great Britain, whether alien or British. He can sue the alien enemy, and there is nothing to prevent the alien enemy from delivering a defence and being represented in the action: *Robinson & Co.* v. *Continental Insurance Co.*, [1915] 1 K. B. 155.

(c) *Appeals.*—If an alien enemy plaintiff has obtained judgment before the war his right of appeal is suspended during the war: *Porter* v. *Freudenberg*, [1915] 1 K. B. 857. If the alien enemy is the defendant in an action he may appeal forthwith and the respondent to his appeal may insist on the appeal being heard in ordinary course: *ibid.*

Trading with the Enemy.

(1) *Trading with the Enemy Act, 1939.*

This Act draws a distinction between enemies and enemy subjects.

An "*enemy*" means—

(a) Any State or Sovereign at war with His Majesty.
(b) Any individual resident in enemy territory.
(c) Any body of persons (whether corporate or incorporate) carrying on business in any place if and so long as the body is controlled by a person who is an enemy (within the meaning of the Act). As to "control", see *Daimler Co.* v. *Continental Tyre, etc., Co.*, [1916] 2 A. C. 307.
(d) Any body of persons constituted or incorporated in or under the laws of a State at war with His Majesty.
(e) Any person designated an enemy by an Order of the Board of Trade.

(See section 2 of the Act.)

It will be seen that it is the residence of an individual (even a British subject) in enemy territory which makes him an enemy under this Act.

An *enemy subject* means—

(a) An individual who is a national of a State at war with His Majesty and is not a British subject or a British protected person. Obviously such a person will only be an enemy, as well as an enemy "subject", if resident in enemy territory. A German resident here or in neutral territory is an enemy subject but not an enemy.

(b) A body of persons constituted or incorporated in or under the laws of a State at war with His Majesty.

(See section 15 (1) of the Act.)

Here it may be noted that the fact that a person may possess dual nationality has long since been recognised by the English Courts, and also by statute: see, *e.g.*, British Nationality and Status of Aliens Act, 1914, s. 14.

It is established by several decisions in connection with the last war that a person who is a British subject cannot during time of war by making a declaration of alienage escape his obligation, as a British subject, to serve with His Majesty's Forces under an Act which has already imposed compulsory service upon British subjects; and this rule applies whether the British subject is also a subject of a neutral State or of an enemy State: *Ex p. Freyberger*, [1917] 2 K. B. 129; *Dawson* v. *Meuli* (1918), 118 L. T. 357; *Gschwind* v. *Huntington*, [1918] 2 K. B. 420. And it seems that, on the authority of *R.* v. *Lynch*, [1903] 1 K. B. 444, it may be stated that a person who is solely a British subject cannot even by naturalisation in a foreign country divest himself of British nationality during war-time, quite apart from any statute imposing the obligation of military service. If a person who is both a British subject and a subject of a neutral country has become liable to military service under an English statute he cannot then by declaration of neutral alienage under section 14 of the British Nationality and Status of Aliens Act, 1914, discharge himself from liability to serve in His Majesty's Forces, for the obligation, having arisen, appears to be a continuing one: see *Gschwind* v. *Huntington*, *supra* (*d*).

It is not clear whether—

(i) A person who is both a British subject and the subject of a State not at war with this country can divest himself of British nationality in war-time under any

(*d*) In his very useful and scholarly work on *The Effect of War on Contracts* Dr. McNair *appears* to consider that the question whether a declaration of alienage by a neutral *and* British subject after lawful enlistment will discharge him from *further* service is still open; but this does not seem to be in doubt since *Gschwind* v. *Huntington*, *supra*.

conditions, *e.g.*, before he has become liable for military service.

(ii) A person who is solely a British subject can divest himself of British nationality by naturalisation in a State not at war with Great Britain.

As to these two doubtful cases it would be interesting from a practical angle to know what action neutral countries in general would take if asked to surrender the person in question to the British authorities for service with the British Forces, if he were in the neutral country. An awkward question of conflict of national interests appears to arise in such cases.

Enemy property means—

Any property (real or personal) for the time being belonging to or held or managed on behalf of an enemy or an enemy subject: section 7 (8).

Thus, the property of German nationals wherever resident (unless also British subjects), and of all persons (British or otherwise) resident in enemy territory is enemy property.

What constitutes trading with the enemy?

All commercial, financial or other intercourse or dealings with, or for the benefit of, an enemy are prohibited; for example :—

(a) Supplying to or obtaining from an enemy any goods or trading in or carrying any goods consigned to or from an enemy.

(b) Paying or transmitting any money, negotiable instrument or security for money to or for the benefit of an enemy or to enemy territory.

(c) Performing any obligation to, or discharging any obligation of, an enemy whether undertaken before or after the commencement of the Act.

(See section 1 (2) of the Act.)

By a proviso to section 1 (2) payment may be accepted from an enemy if the sum paid is due in respect of a transaction under which the person receiving payment had performed all his obligations before the commencement of the war.

Preservation of enemy property.

By section 6 it is provided that the Board of Trade may appoint Custodians of enemy property for England, Scotland and Northern Ireland for the collection of enemy debts and the holding of enemy property. A Custodian has been duly appointed for England : (The

Custodian of Enemy Property, Public Trustee Office, Kingsway, W.C.2).

From the definition of enemy property it will be seen that vesting orders may be made in respect of the property of enemy subjects and of enemy aliens.

(2) *Trading with the Enemy (Custodian) Order, 1939.*

In this Order the terms "enemy", "enemy subject" and "enemy property" have the same meaning as in the Trading with the Enemy Act (see above).

The Order directs that all money payable to or for the benefit of an enemy shall be paid to the Custodian: article 1. Various examples are given, and these include "rent or other payment reserved out or payable in respect of freehold or leasehold property or any interest in land or any manor": article 1 (ii). The Board of Trade may by Order vest in the Custodian such property of enemies or of enemy subjects as may be prescribed or the right to transfer such property: article 2 (i).

The Custodian will normally hold any money or other property vested in him until the end of the war and will then deal with it as directed by the Board of Trade; but he may under directions of that Board pay or transfer such money or property to or for the benefit of the person who, but for the Act or Order, would have been entitled to it, or authorised by such person to receive it: article 3.

Any person holding or managing on behalf of an enemy (not an enemy subject) any property is required by the Order to notify the Custodian and to furnish such returns and produce such documents as the Custodian requires. Any enemy subject who holds or manages any property or any person who holds or manages any property on behalf of an enemy subject must also furnish such returns and produce such documents as the Custodian requires; but is not required to notify the Custodian: article 5 (i) and (ii). Similarly, companies must notify the Custodian in writing of all investments in the company held by or on behalf of an enemy: article 5 (iii). Moreover, by article 5 (iv):

(i) where any money has been lent to a firm for the purpose of its business by a person who became an enemy before September 18, 1939,

(ii) where any partner of a firm has at any time before September 18, 1939, become an enemy,

then every partner of such firm is required to furnish to the Custodian in writing full particulars of any share of profits or interest due to such enemy.

And by the same paragraph it is provided that every partner of every firm, any partner of which becomes an enemy after September 17, 1939, or to which a person who becomes an enemy has lent money for the purpose of the firm's business before that person becomes an enemy, must also furnish the same particulars to the Custodian : article 5 (iv).

General.

It has been seen that all commercial, financial or other intercourse or dealings with the enemy are prohibited by section 1 of the Act; and that payment of money or discharge of obligations to an enemy are prohibited expressly by the same section. Moreover, by proviso (ii) to sub-section 2 of that section payment *from* an enemy can only be accepted where the payee's obligations have been fully discharged before the war. The money must be " due in respect of a transaction under which all obligations on the part of the person receiving payment had been performed before the commencement of the war ". Thus, A is a merchant in Hamburg and agrees in peace-time with B, a merchant in England, for the sale of beet sugar to be delivered to B at Hamburg by instalments over a period. The contract provides, if war breaks out between England and Germany, the contract is to be closed at the average quotation of the sugar and accounts made up and all differences to be paid by one party to the other. War breaks out between the two countries. This is not an automatic avoidance by the outbreak of war (on the ground of illegality). On the contrary, the provision for closing the contract is valid : *Smith, Coney and Barrett* v. *Becker, Gray & Co.*, [1916] 2 Ch. 86. Here, B has, in a sense, discharged all his obligations before the outbreak of the war; but it is not altogether clear that he is entitled to receive from A any sum which may be due from him on the making up of accounts, if in fact he can obtain payment. What is the position if there is no such provision, and the contract is accordingly rendered illegal and frustrated upon the outbreak of war? It has already been mentioned that where a contract is frustrated the normal result is that neither party can recover any benefit which has lawfully passed to the other party; but if a payment ought to have been made by one party to the other before the frustrating event such payment must still be made. But can it be said in such cases that the English merchant has performed all his obligations before the commencement of the war. It is sometimes said that frustration arises from an implied condition in the contract under which the contract is to be discharged upon the frustrating event

taking place. The fact is that the English merchant's obligations in respect of the transaction have not been performed before the war; he is merely discharged (by operation of law) *upon* the outbreak of war, from the further performance of his obligations. The distinction between the two cases is fine; but it is submitted that where the contract *expressly* brings to an end the obligations of the parties upon the outbreak of war, then if the English merchant has performed all that he is due to perform up to the date when war breaks out he can lawfully receive payment from the German merchant.

Applying these principles to contracts for sale of freehold or leasehold property in England let us see what is the result.

A is a British subject resident in England. B is of German nationality residing in Berlin. During the present war A cannot agree to sell to B any English property belonging to A; nor can A agree to purchase from B any English property belonging to B.

But what if the contract is entered into before the outbreak of war? We first dismiss the case in which the contract has been executed by one of the parties.

(a) If the alien enemy has performed his part of the contract his right to enforce the contract is suspended until the termination of the war: *Alcinous* v. *Nigreu* (1854), 4 E. & B. 217.

(b) If the British subject has performed his part of the contract he can sue the alien enemy: *Robinson & Co.* v. *Continental Insurance Co.*, [1915] 1 K. B. 155; *Ex p. Bousmaker* (1806), 13 Ves. 71. And under section 1 (2) (proviso) of the Trading with the Enemy Act the British subject may lawfully receive payment from the alien enemy.

If, however, there has been no performance by either party then in order to obtain performance of the contract intercourse between the enemy alien and the British subject will usually be necessary, and this is prohibited: *Ertel Bieber & Co., Ltd.* v. *Rio Tinto Co.*, [1918] A. C. 26. It seems clear that the result in such cases is that the contract is discharged, and not merely suspended, on the outbreak of war: *ibid.* And see *Re Badische*, [1921] 2 Ch. 331, 380.

But there is the possibility that not only was the contract made before the war but that an attorney resident in England has been appointed before the war to sell the property, or that the enemy subject being resident here during war (and thus not an alien enemy) appoints an attorney here, before proceeding to Germany, with power to sell his freehold or leasehold property. In these

cases it appears that the sale can lawfully be carried into effect. In *Tingley* v. *Müller*, [1917] 2 Ch. 144, the facts were as follows: A was a German national resident in England and owned a leasehold property here. During the Great War he gave to an English solicitor a power of attorney, expressed to be irrevocable for a year, under which his attorney was authorised to sell his leasehold property and to assign it to the purchaser. A few days later A, under permit, left England and went to Germany. The plaintiff purchased A's leasehold property without knowledge of A's nationality at a date when A had arrived in Germany and was, as the Court found, an alien enemy. Upon learning the facts the plaintiff sought a declaration that the contract for purchase was dissolved or void and claimed the return of the deposit paid by him. It was held by a majority of the Court of Appeal that the fact that the vendor is an alien enemy does not avoid a contract for the sale of land made on his behalf by an attorney under an irrevocable power of attorney if the attorney was appointed *before* the vendor became an alien enemy, although the contract is made after the vendor has assumed enemy character. It was considered that neither the making nor the completion of the contract involved any intercourse with the enemy as the attorney could convey the property and receive the price (or authorise its payment to the Custodian) without communicating with the enemy principal. It was expressly laid down that there was no contravention of the Trading with the Enemy Proclamation or Acts. Whilst those Acts differed in many respects from the Trading with the Enemy Act, 1939, it does not seem that there is anything in that Act which would invalidate a similar transaction. It will, however, be appreciated that it would be necessary under the 1939 Act that the balance of the purchase price should be paid to the Custodian, for the proviso to section 1 (2) of the Trading with the Enemy Act, 1939, does not apply: *vide supra*.

It is not clear whether the last word has been said on this subject, for Scrutton, L.J., in *Tingley* v. *Müller*, *supra*, in a dissentient judgment, expressed the view that to contract with an alien enemy through his agent did amount to trading or having commercial intercourse with an enemy. The Trading with the Enemy Act, 1939, forbids "all commercial, financial or other intercourse or dealings with or for the benefit of an enemy" (section 1); but this wording does not appear, in principle, to widen the field of dealings prohibited at common law. See in this connection *Ertel Bieber & Co.* v. *Rio Tinto Co.*, [1918] A. C., at pp. 267, 268; and *Robson* v. *Premier Oil and Pipe Line Co.*, [1915] 2 Ch., at p. 136.

Sale of Furniture and Chattels.

It is not unusual for a contract for the sale of furniture or other chattels to be combined with a contract for the sale of land.

It may therefore be useful to set out here the effect of certain sections of the Sale of Goods Act upon contracts for the sale of such effects where they are destroyed after contract but before completion.

Unless otherwise provided by the contract the goods remain at the vendor's risk until the property in them passes to the purchaser; and delivery to the purchaser will not affect the incidence of the risk : Sale of Goods Act, 1893, s. 20. If, however, the goods are specific and in a deliverable state (*e.g.*, if, as is generally the case, they are to be taken in their present condition), the property, and with it the risk, will pass to the purchaser immediately upon exchange of contracts : section 18. It matters not that payment or delivery is to be made at a later date : *ibid.*

But—

(1) If there is a sale of specific goods, and the goods have perished at the date when the contract was made without the *vendor's* knowledge the contract is void : section 6. Accordingly any deposit paid can be recovered as upon total failure of consideration.

(2) If after an agreement to sell specific goods the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer the agreement is avoided : section 7. And the deposit paid can also be recovered in this case.

By "specific goods" is meant goods specifically described. They need not be in existence at the date of the contract; but they must be "identified and agreed upon at the time a contract of sale is made". They are to be distinguished from generic or unascertained goods and from future goods, *i.e.*, "goods to be manufactured or acquired by the seller after the making of the contract of sale" : section 5.

Where furniture or other chattels are sold with a freehold or leasehold property what is to happen if the furniture, etc., has been destroyed, or is destroyed after contract and the price is inclusive of the furniture or other chattels? It seems that in such cases the question is whether the chattels are an essential or non-essential adjunct : *Richardson* v. *Smith*, L. R. 5 Ch., at pp. 652, 654. If they constitute an essential adjunct it appears that specific performance will not be ordered, even with compensation : *ibid.* But if the chattels are not essential to the sale a deduction may

be made of the proper price of the chattels and specific performance can be ordered in respect of the contract for purchase of the freehold or leasehold property without the chattels : *ibid.*; *Smith* v. *Peters* (1875), 20 Eq. 511; and *Jackson* v. *Jackson* (1853), 1 Sm. & G. 184. The authorities cited in this paragraph were not cases of destruction by fire or other accident. They were cases in which freehold or leasehold property had been sold together with chattels, and either through a valuation not being made, or for some other reason specific performance was required of the contract relating to the freehold or leasehold property alone. But it appears from *Richardson* v. *Smith*, *supra*, that the same principle applies where the vendor has no title to the chattels or they have been destroyed.

UNDUE INFLUENCE AND FIDUCIARY RELATIONSHIP.

By W. H. D. Winder, M.A., LL.M., of Lincoln's Inn, Barrister-at-Law.

Among the many phrases which have been used to cover a variety of legal principles is undue influence. The apparent vagueness of the words has led to loose usage, which is strikingly illustrated in the criminal law (*a*). They are a frequent source of confusion in a common law connection and even in equity undue influence has been a tempting formula (*b*). Nevertheless the equitable doctrine has a precise application : it is distinct from abuse of fiduciary relationship as well as from much else. A trustee, a solicitor, and an agent accept a position of confidence towards a beneficiary, a client, and a principal, and equity exacts a high degree of good faith. Breach of their fiduciary obligations gives the party who trusts them a remedy but there will usually be no question of undue influence. Abuse of confidence and undue influence are different principles.

If this distinction had always been attended to certain difficulties would have been avoided. Not all fiduciary relationships involve personal influence. Thus the Court may set aside a sale or similar transaction which benefits a person under fiduciary obligation but it will set aside a gift only if there has been undue influence. In *Re Coomber* (*c*) the Court of Appeal insisted on the distinction,

(*a*) Corrupt and Illegal Practices Act, 1883 (46 & 47 Vict. c. 51), s. 2.
(*b*) For other aspects of the subject see "Undue Influence and Coercion", an article by the present writer, 3 Modern Law Review, Oct. 1939, pp. 97—121.
(*c*) [1911] 1 Ch. 723.

allowing a gift to a confidential agent and manager of property to stand. Cozens-Hardy, M.R., remarked : "I do not think it is true to say that any confidential relation between donor and donee is sufficient to set up a presumption against the validity of the gift." He continued : "There are confidential relations in which there is a presumption of undue influence . . . but to apply that to every fiduciary relation and every relation of confidence is, I venture to think, not according to any authority and distinctly contrary to principle" (*d*). Fletcher Moulton, L.J., in a vigorous judgment, pointed out that there were many different types of fiduciary relations, in some of which the Courts have interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. "Thereupon in some minds arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference" (*e*). He thought that "this illustrates in a most striking form the danger of trusting to verbal formulæ" (*f*).

Such a danger is apparent where a solicitor, trustee, or agent is concerned, for in these instances there is a vital distinction between a benefit taken by way of gift and by way of sale, lease, or other transaction for value. Other fiduciary relationships have not caused much misunderstanding. For example, the duty of a promoter of a company towards the company he is promoting has been clearly established on the ground of his fiduciary position. Even here, however, the apparent analogy of undue influence tempted Lord Penzance and he likened the company promoter to the parent, the guardian, and the priest who derives a benefit from the child, the ward, and the penitent (*g*). Of this it may be said that there seems to be no case which has gone the length of casting on a promoter the burden of proving in the first instance that a contract between him and the company was a fair one (*h*). But this is the burden which equity imposes where the rule of undue influence proper applies. Further, the rule requires personal influence, presumed or proved, which cannot be present where the other party—the company—is not in existence.

It is this personal influence which is the essence of equity's doctrine. Because one mind is under the habitual influence or ascendancy of another, who benefits from his position of dominance, the Court interposes. That influence may be good and natural in

(*d*) *Ibid.* 726, 727.
(*e*) *Ibid.* 729.
(*f*) *Ibid.* 728.
(*g*) *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 1230.
(*h*) See Pollock, Principles of Contract, 603 n.

itself but it must not be misused. In strictness undue influence means the undue exercise of influence. The influence may be proved *de facto* or, more commonly, may be presumed as in the case of parent, guardian, and spiritual adviser. The common phrase "a presumption of undue influence" really means that a person in a position of influence (presumed or proved) who takes a benefit is held to have taken it by an undue exercise of his influence unless the contrary is proved. How do these principles affect persons who enter into fiduciary relationships?

(a) *Solicitor and Client.*—A solicitor is not incapable of dealing with his client but it must be shown that the bargain is as good as any that could have been obtained by due diligence from any other purchaser. The onus of proving that the bargain is a proper one is placed on the solicitor. In what may be regarded as the two leading cases on the subject, Lord Eldon did not find it necessary to make a single reference to the law of undue influence. In *Gibson* v. *Jeyes* (*i*), where a bargain was set aside, he said: "If he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest, that he has given her all that reasonable advice against himself, that he would have given her against a third person. It is asked, where is that rule to be found. I answer, in that great rule of the Court, that he, who bargains in matter of advantage with a person placing confidence in him is bound to show, that a reasonable use has been made of that confidence." In *Crane* v. *Allen* (*k*), where a bargain was allowed to stand, the same Judge said: "If he dealt for the property, he must put an end to the confidential relation, or put himself completely at arm's length; or if the contract was afterwards quarrelled, it would be incumbent upon him to show that he had made a reasonable use of that confidence."

The principle enunciated by Lord Eldon has been followed in the great majority of subsequent cases (*l*), which rest on the ground of fiduciary relationship. Jessel, M.R.'s, statement in *Cockburn* v. *Edwards* (*m*) is typical: "If a man acts in a fiduciary position towards another in a matter in which he himself has a

(*i*) (1801), 6 Ves. 267, 278.
(*k*) (1814), 2 Dow 289, 299, H. L.
(*l*) *E.g.*, *Champion* v. *Rigby* (1830), 1 Russ. & M. 539; Tam. 421; affirmed 9 L. J. Ch. 211; *Thomas* v. *Phillipps* (1847), 11 Jur. 80; *Cockburn* v. *Edwards*, 18 Ch. D. 449, C. A.; *McPherson* v. *Watt*, 3 App. Cas. 254; *Cutts* v. *Salmon* (1852), 21 L. J. Ch. 750; *Harrison* v. *Guest* (1856), 6 De G. M. & G. 424; *Gardener* v. *Ennor* (1866), 35 Beav. 549; *Rhodes* v. *Bate*, 1 Ch. App. 252; *Demerara Bauxite Co.* v. *Hubbard*, [1923] A. C. 673, P. C. In most of these cases undue influence is not even casually mentioned.
(*m*) 18 Ch. D. 449, 455, C. A.

personal interest, he is liable to be called upon to account as to the discharge of his fiduciary duties." In *Spencer* v. *Topham* (*n*), where it was sought to upset a purchase by a solicitor, Romilly, M.R., declared: "No undue influence or pressure is suggested." The well-known case, *Wright* v. *Carter* (*o*), concerned both a gift and a sale to a solicitor. In respect of the sale neither Stirling, L.J., nor Cozens-Hardy, L.J., referred to undue influence but found an exposition of the duties attendant on a fiduciary relation sufficient for their purpose (*p*). Those duties are founded on the contract by which a solicitor agrees to advise his client, not on any principle which governs freedom of contract in general. It is no argument against this view that a solicitor may remain under obligation after he has ceased to act for his client. "Although the relationship of solicitor and client in a strict sense has been discontinued, the same principle applies so long as the confidence, naturally arising from such a relationship, is proved or may be presumed to continue" (*q*). Even if the solicitor is no longer retained or acting, his duty, in the contemplation of a Court of equity, may still be such as to throw upon him the onus of supporting the validity of a purchase from his former client. Confidence may survive contract. There is no need to base the rule on undue influence. Turner, L.J., however, in *Holman* v. *Loynes* (*r*), was inclined to explain such a result on the ground of influence, doubting whether "the confidential relation can be said to be determined at all, whilst the influence derived from it can reasonably be supposed to remain". He quotes the similar rule in the case of gifts (*s*) where undue influence is appropriate and the analogy misled him. Parker, J.'s, explanation is preferable, being a logical extension of the fiduciary principle without the assistance of the extraneous principle of undue influence.

The cases of sales and other bargains have also been explained on the ground of pressure by a Judge who was perhaps unduly attracted by that word (*t*). He was ready to relieve "from the pressure arising from the relation of solicitor and client . . . unless enough is done to extricate the client from the pressure

(*n*) (1856), 22 Beav. 573, 577.
(*o*) [1903] 1 Ch. 27, C. A.
(*p*) But Vaughan Williams, L.J., held that the sale was made "under the influence of" the solicitor: *ibid.* 56.
(*q*) Parker, J., in *Allison* v. *Clayhills*, 97 L. T. 709, quoted with approval in *Demerara Bauxite Co.* v. *Hubbard*, [1923] A. C. 673, 675, P. C.
(*r*) (1854), 4 De G. M. & G. 270, 283. But Cranworth, L.C., did not refer to undue influence.
(*s*) See *infra*.
(*t*) *Morgan* v. *Higgins* (1859), 1 Giff. 270; *Cowdry* v. *Day*, 1 Giff. 316, Stuart, V.-C. See 3 Mod. L. Rev. p. 112 and *infra*.

of the relation" (*u*). It is impossible to accept his view that because of pressure "in all these cases the doctrine is that the subsistence of the confidential relation constitutes an imperfection in the consent given by the party who is to be bound by the contract" (*x*); for the fact that the solicitor gives inadequate advice or consideration does not affect the other's consent. The equitable doctrine of pressure signifies that consent has been obtained by threats not amounting to duress. It does not apply to a solicitor unless he is guilty of this type of actual pressure (*y*). Solicitors may also be concerned in bargains made by persons in distressed circumstances. Equity allows relief if distress or necessity has been exploited (*z*). The reason is the inequality in the position of the parties, or "imposition" as older cases prefer. In *Walmesley* v. *Booth* (*a*) the client was in prison under several criminal charges and in return for his attorney's services in obtaining bail executed a bond substantially benefiting him. Lord Hardwicke allowed the bond to stand as security for the attorney's proper charges only, because of "imposition and an undue advantage taken" of the plaintiff's necessities, he being "in such circumstances that anybody might have taken the advantage of him". The case was said to be "stronger between attornies and their clients" because of "the great power and influence that an attorney has over his client". But undue influence is not the basis of the decision. It was a case of imposition on another's distress where the exploiter happened to be a solicitor. The same reason was also given by Lord Mansfield in a similar case (*b*). It is apparently this type of case that Wigram, V.-C., had in mind when he said: "The relation between the parties may simply produce a degree of influence and ascendancy, placing the client in circumstances of disadvantage; as where he is indebted to the attorney, and is unable to discharge the debt" (*c*). If this is sufficient reason for the Court to interfere then imposition or inequality has an extended application where solicitors' bargains are concerned. But they are not thereby brought within the principle of undue influence.

The last-mentioned case followed *Montesquieu* v. *Sandys* (*d*) in holding that a purchase of client's property with which the

(*u*) 1 Giff. 325.
(*x*) 1 Giff. 279.
(*y*) *E.g.*, *Gibbs* v. *Daniel* (1862), 4 Giff. 1, Stuart, V.-C., where a solicitor secured a purchase by threats of legal proceedings and "actual pressure".
(*z*) *E.g.*, *Fry* v. *Lane*, 40 Ch. D. 312.
(*a*) (1739), 2 Atk. 27.
(*b*) *Ward* v. *Hartpole*, 3 Bligh 470, H. L., following *Walmesley* v. *Booth*.
(*c*) *Edwards* v. *Meyrick* (1842), 2 Hare 60, 70.
(*d*) (1811), 18 Ves. 301.

solicitor has had no concern and no special knowledge will not be upset if both parties are ignorant of the fact that it was worth more than the price paid. "Under such circumstances he is not the attorney *in hac re*; and therefore, not being under any duty as attorney to advise against the act, he may be the purchaser" (*e*). There has, in other words, been no abuse of confidence. If undue influence were appropriate here the result would have been expressed by saying that the presumption of undue influence had been rebutted. In following Lord Eldon, Wigram, V.-C., expresses the true view of the Courts: "Though the relation of solicitor and client exists in one transaction, and, therefore, personal influence or ascendancy may operate in another, yet the relation not existing *in hac re*" the sale will be allowed to stand (*f*). The personal influence is ignored. If a solicitor's bargains with his client were controlled by the rule of undue influence then it would have to be applied whether he was in a confidential position with regard to the particular property or not. Undue influence implies habitual ascendancy or influence over a weaker mind and if it is present on one occasion it is present on all unless the contrary is shown.

This is the logical standpoint from which equity views parents, guardians, religious advisers and those exerting *de facto* influence, but it is deserted when solicitors are considered, for gifts to a solicitor are treated differently from sales and other bargains. Gifts by a client are subject to a presumption of undue influence. For this there is unshaken authority: fiduciary relationship is not the reason for interfering as it is in the case of sales.

In the early cases the analogy of the treatment of gifts to parents and guardians was relied on. Undue influence was undoubtedly the reason for scrutinising such gifts and the Courts applied a similar scrutiny to solicitors, adopting the same terminology. In *Welles* v. *Middleton* (*g*), where a gift to a solicitor was declared void, Lord Thurlow referred to the established rule under which a guardian could not "avail himself of the habits of intimacy and influence (the true honest and just influence as it is in itself) he might have in the mind of an infant or child coming of age, to obtain from him a gift" (*h*). He held the same rule applied to a solicitor, for "there would be no bounds to the crushing influence of the power of an attorney who has the affairs of a man in his hands, if it were not so" (*i*). It is probable that before this decision equity would have interfered

(*e*) Eldon, *ibid.* 313.
(*f*) *Edwards* v. *Meyrick*, *cit. sup.*
(*g*) (1784), 1 Cox 112, aff. H. L.
(*h*) *Ibid.* 125.
(*i*) *Ibid.*

only if there had been circumstances of distress or champerty (*k*). Lord Thurlow's reasoning was approved by Lord Eldon in two decisions not directly in point, *Wood* v. *Downes* (*l*), which concerned a champertous purchase, and *Montesquieu* v. *Sandys* (*m*), where the purchase was free from champerty.

There followed a period of uncertainty before clients were finally accepted as a protected class benefiting by a presumption of undue influence. In *Goddard* v. *Carlisle* (*n*) a solicitor was restrained from suing at law for an annuity granted by a young and inexperienced client, but the reasoning is inconclusive. The parties were connected by friendship and general association and Richards, L.C.B., implies that undue influence was not presumed, for he says that equity interposes "where it can be shown that he was so connected with his client, as to have obtained any considerable influence over him" (*o*). Graham, B., was not satisfied with the simple reason of professional relationship, for he said the solicitor "also stood and acted in a situation of quasi guardian, at least, to the plaintiff" (*p*). On the other hand, in *Casborne* v. *Barsham* (*q*), Langdale, M.R., said the relationship of solicitor and client was one where there was "so much of habitual exercise of power on the one side, and habitual submission on the other, that without any proof of the exercise of power beyond that which may be inferred from the nature of the transaction itself, this Court will impute an exercise of undue influence". But in a later case Romilly, M.R., took a narrower view, saying (*r*) "the fact of the relation of solicitor and client is an ingredient in estimating the extent of the actual or probable influence exercised over the donor". He did not give full play to any presumption, finding as a fact that there was no more than "strong regard, friendship and esteem". After Kindersley, V.-C., in *Tomson* v. *Judge* (*s*), decided that a gift was absolutely invalid, a conclusion not now accepted, Stuart, V.-C., expressed the rule in its modern form (*t*), but he was later moved to put it on the ground of pressure (*u*). The correct view is expressed by Bacon, V.-C., in

(*k*) In *Oldham* v. *Hand* (1751), 2 Ves. Sen. 259, Hardwicke allowed a gift not made under distress, refusing to follow the guardian and ward principle. But contrast his *dictum* in *Hylton* v. *Hylton* (1754), 2 Ves. Sen. 547, 548.
(*l*) (1811), 18 Ves. 120, 127.
(*m*) *Ibid.* 302, 312.
(*n*) (1821), 9 Price 169, Ex., Equity.
(*o*) *Ibid.* 180, 181.
(*p*) *Ibid.* 183.
(*q*) (1839), 2 Beav. 76, 78.
(*r*) *Walker* v. *Smith* (1861), 29 Beav. 394, 396.
(*s*) (1855), 3 Drewry 306.
(*t*) *Re Holmes' Estate* (1861), 3 Giff. 337, 345.
(*u*) *O'Brien* v. *Lewis* (1863), 32 L. J. Ch. 569, aff. Lord Westbury, L.C., *ibid.* 572, on the ground of "public utility".

Morgan v. *Minett* (*x*). "You cannot", he said, "inquire how much influence there was; it is enough, in the contemplation of the law, that the influence existed, that there is a possibility that it may be abused; and the rule is not a hard one upon a solicitor." The Court of Appeal has now clearly established the rule on this basis of a presumption of undue influence (*y*).

It seems, therefore, so far as *inter vivos* dispositions are concerned, that solicitors are controlled on account both of their fiduciary position and undue influence, according to whether purchases or gifts are in question. This twofold treatment is mentioned in a long-forgotten text-book (*z*) where the author says attorneys and solicitors are "under the double restraint arising from influence over their clients, and the confidence reposed in them". He has not, however, perceived that the two restraints have different bearings.

It is probable that barristers who take gifts are treated in the same way as solicitors. In *Broun* v. *Kennedy* (*a*) a satisfied client conveyed a large estate to her counsel who had successfully appeared for her. The gift was set aside, but it is difficult to determine the true *ratio decidendi* of Romilly, M.R.'s, judgment, for he found as a fact that "the defendant possessed a great and overpowering influence over the mind of the plaintiff" and "in whatever way the influence over the plaintiff was acquired by the defendant" "it was exerted by him, in this instance at least, exclusively for his own advantage" (*b*). Romilly, M.R., was inclined in the case of solicitors also to require the presence of actual personal influence (*c*). However, he gives as a subsidiary reason that the barrister's influence also "arose from the relation of confidential adviser and counsel previously existing and subsequently continued". The decision was affirmed on appeal (*d*) but the very short judgments are not helpful, though they do not seem to insist on proof of actual influence. But there is no doubt that there was actual personal ascendancy present in the case.

Where a solicitor benefits under a will different considerations apply. Undue influence in that connection has a peculiar meaning with which this article is not concerned.

(b) *Agent and Principal.*—The fiduciary position of an agent necessitates a high standard of honesty in dealings with his prin-

(*x*) 6 Ch. D. 638, 647.
(*y*) *Liles* v. *Terry*, [1895] 2 Q. B. 679; *Wright* v. *Carter*, [1903] 1 Ch. 27.
(*z*) George Jeremy, "A Treatise on the Equitable Jurisdiction of the High Court of Chancery", 1828, p. 395.
(*a*) (1863), 33 Beav. 133.
(*b*) *Ibid.* 146, 153.
(*c*) *Supra*, p. 280.
(*d*) 4 De G. J. & S. 217.

cipal. For example, before purchasing from his principal he must acquaint him with all the knowledge he has of the property. This and other fiduciary duties have often been expressed by the maxim that an agent cannot be allowed to put his duty in conflict with his interest. In an early case where leases obtained from a principal were set aside Lord Thurlow remarked that "if a confidence is reposed, and that confidence is abused, a Court of equity should give relief" (*e*). There were other factors present, but the Judge declared that "the abuse of confidence is also a circumstance" (*f*). There is no reference to undue influence, nor is there in the great majority of the subsequent cases on the subject (*g*). Fiduciary relationship or abuse of confidence has been found an adequate principle without the introduction of irrelevant "undue influence".

A source of some confusion has been the case *Tate* v. *Williamson* (*h*), where an agent was not permitted to retain a purchase, for Lord Chelmsford, L.C., said: "Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage." It is unfortunate that these words have been so often quoted, for influence and confidence here seem inextricably confused. A person is not capable of wielding influence, as equity understands the word, merely because confidence is reposed in him. However, in deciding to impeach the purchase Lord Chelmsford was content to say "the defendant had placed himself in such a relation of confidence . . . as prevented him from becoming a purchaser of that property without the fullest communication of all material information which he had obtained as to its value" (*i*). In *Moxon* v. *Payne* (*k*), where a sale to a confidential agent and partner was avoided, James, L.J., was also ensnared by the analogy of undue influence. He declared that "the obtaining of property, or of any benefit, through the undue and unconscientious abuse of influence by a person in whom trust and confidence are placed, has always been treated as a fraud of the gravest character". But the fact that "trust and confidence" are placed

(*e*) *Gartside* v. *Isherwood* (1778), 1 Bro. C. C. 558, 559.
(*f*) *Ibid.* 562.
(*g*) *E.g.*, *Taylor* v. *Obee* (1816), 3 Price 83; *Lowther* v. *Lowther* (1806), 13 Ves. 95; *Lord Selsey* v. *Rhoades* (1824), 2 Sim. & St. 41, aff. H. L. 1 Bligh (N.S.) 1; *Dunne* v. *English*, L. R. 18 Eq. 524. Similarly the more recent cases.
(*h*) 2 Ch. App. 55, 61.
(*i*) *Ibid.* 66.
(*k*) 8 Ch. App. 881, 887.

is quite a sufficient reason for equitable intervention without introducing abuse of an influence which is not present. It is unnecessary to refer to the many cases subsequent to the two last discussed : undue influence finds no place (*l*). Running through them all is the idea of fiduciary relationship which is constantly expressed.

More uncertainty has existed where it is sought to impeach, not purchases, but gifts from principal to agent. There cannot be said to be any breach of confidence in an agent's accepting a voluntary gift. The fiduciary relationship is not thereby impaired. If such gifts are to be condemned some other reason must be found. But the Courts have not yielded to the attempt to impose a presumption of undue influence in such cases. They have refused to supplement, as in the case of solicitor and client, the law of fiduciary relationship.

In the first case (*m*) in which the Court was asked to set aside a gift the circumstances were particularly unfavourable to the agent. He was the receiver under the order of the Court of an infant's estate of which he had been steward during the father's lifetime. After coming of age the plaintiff conveyed to him a leasehold reversion by way of gift. Strange, M.R., with some reluctance, refused to set aside the conveyance, although, as he said, confidence had been reposed and it was "imprudent and dangerous" for the agent not to have advised the plaintiff to consult a common friend or third person. But although "the Court will rather presume that things were transacted fairly, unless the contrary appears", it ordered a "release of all the covenants which were proper to be made from vendor to vendee, but very improper in a grant of bounty, which is taking a middle way between setting it aside and letting it exist totally" (*n*). The law of undue influence was not referred to nor was it in *Harris* v. *Tremenheere* (*o*), where Lord Eldon allowed a gift of leases to an agent and he said he could find no decision authorising him to say that the defendant should not have taken the leases as of the pure gift of his employer. Nevertheless "where a person in that situation takes leases without calling in third persons, a suspicion attaches upon the transaction", and for that reason costs were refused to the defendant (*p*). When in *Hunter* v. *Atkins* (*q*) it was deliberately sought to extend the doctrine of

(*l*) *E.g.*, *Wright* v. *Long*, 14 T. L. R. 434, C. A.
(*m*) *Cray* v. *Mansfield* (1749), 1 Ves. Sen. 379.
(*n*) *Ibid.* 382.
(*o*) (1808), 15 Ves. 34.
(*p*) *Ibid.* 40.
(*q*) (1834), 3 My. & K. 113, reversing Leach, M.R.

undue influence to a confidential agent who accepted a gift, Lord Brougham, L.C., decisively rejected it in one of his elaborate and eloquent judgments. The principal, an admiral over ninety years of age, had for years been in habits of friendship with his confidential agent, an alderman, whose own solicitor drew the deed without the intervention of a third person. Undue influence was not presumed against the alderman nor did it exist in fact, for the admiral was not "subjected to his sway". For this reason the gift was held to be good.

In view of this decision little authority can be attached to the case *Consett* v. *Bell* (*r*). The donor conveyed to her confidential servant all the chattels and money which at her decease should lie in two particular rooms, with no power of revocation, and without independent advice. Without adverting to undue influence Knight-Bruce, V.-C., held that the deed would not be aided in equity and if it had effect at law a Court of equity would not allow it to stand as "it is impossible for me to suppose that a person of ordinary prudence or discretion, properly advised, would have knowingly executed this instrument as an act *inter vivos*" (*s*). It seems impossible to support this decision for there were no additional circumstances of infirmity, distress, or poverty present (*t*). The Court of Appeal has unanimously decided (*u*) in accordance with the principle laid down in *Hunter* v. *Atkins*. To the testimony already cited of the other members of the Court may be added that of Buckley, L.J.: "It is not every fiduciary relation that calls this doctrine of equity into action. Between master and servant, between employer and bailiff or steward, there subsists, of course, a fiduciary relation; but there is no authority for the proposition that by reason of the existence of relations such as those a deed of gift from the one to the other can be set aside. This doctrine of equity does not rest upon the existence of a fiduciary relationship whatever be its nature. It rests upon the existence of such a fiduciary relationship as will lead the Court to infer undue influence" (*x*).

This reasoning removes the difficulty of reconciling *Huguenin* v. *Baseley* (*y*) with the other decisions on confidential agents. This case is much quoted as an authority on undue influence of a religious character, but Sir F. Pollock thinks (*z*) that the

(*r*) (1842), 1 Y. & C. Ch. Cas. 569.
(*s*) *Ibid.* 578.
(*t*) As *e.g.*, in *Fry* v. *Lane*, 40 Ch. D. 312.
(*u*) *Re Coomber*, [1911] 1 Ch. 723, *supra*, p. 274.
(*x*) *Ibid.* 730.
(*y*) (1807), 14 Ves. 273.
(*z*) Principles of Contract, 614.

judgment proceeds on the ground of confidential agency. It is certainly only the argument of Sir S. Romilly about spiritual influence to which repeated judicial approval has been given. The agent and manager of property who received a gift was a clergyman, Baseley. The donor, a widow, thought she had "the greatest reason to believe that Providence has raised me up a friend, and that friend is Mr. Baseley". She thereupon appointed him the manager of her property and entrusted all her affairs to him. In spite of Sir S. Romilly's attractive argument, Lord Eldon, in setting aside the gift, lays little stress on undue influence. But it is difficult to suppose he meant that the mere fact of confidential agency was sufficient, for a year later he decided it was not (*a*). It would seem that attention ought to be paid to his remark (*b*) that "if the conveyance was executed under the effect of that, which has always been considered in this Court as undue influence" it ought to be set aside. By this he must surely mean undue influence of a religious type. If the presence of religious influence is treated as a vital element then Lord Eldon's judgment is consistent with principle and authority and consistent with his own subsequent decision.

For the same reason if an agent has actual influence, the Court is justified in intervening, provided the existence of the influence is clearly proved. Thus a deed of gift by a woman of great age and wholly illiterate in favour of her nephew who had the management of all her affairs was impeached because of his influence over her (*c*). It was found as a fact that "her relationship with the respondent was such that he had gained complete ascendancy over her, and that the presumption arose that the deed was procured by his undue influence" (*d*). Here, as in *Huguenin* v. *Baseley*, there was more than breach of confidence. In both cases it can be said that the gift was presumed to spring from the undue exercise of influence. That influence could be presumed in the earlier case because the donee was a religious adviser; in the later case it was proved. But where the agent is in a simple position of confidence the doctrine of undue influence finds no footing. The gift will be held good because there has been no abuse of confidence.

(c) *Trustee and Beneficiary.*—There can be no doubt that the rules which control a trustee in his dealings with the trust property

(*a*) *Harris* v. *Tremenheere* (1808), 15 Ves. 34, *supra*, p. 283.
(*b*) *Huguenin* v. *Baseley*, 14 Ves., p. 296. As Brougham, L.C., said of this case in *Hunter* v. *Atkins*, 3 My. & K., p. 140, "There was a great and general influence exercised of a peculiar kind".
(*c*) *Inche Noriah* v. *Shaik Allie Bin Omar*, [1929] A. C. 127, P. C.
(*d*) *Ibid.* 132.

and his beneficiary spring from his fiduciary position, although there are *dicta* to the effect that the undue influence principle applies (*e*). A trustee cannot purchase from himself and may only purchase from his beneficiary if they are " at arm's length ". It is easy to agree with a recent declaration of the Privy Council that " it would be profitless to quote the many cases which have arisen to illustrate the doctrine. They may all be referred to the same root idea, that equity will not allow a person who is in a position of trust, to carry out a transaction where there is a conflict between his duty and his interest " (*f*). The cases which established the trustee's fiduciary obligations make no reference to undue influence (*g*). They are obligations attached to the office which a trustee accepts. As Lord Eldon explains, " A trustee, who is entrusted to sell and manage for others, undertakes in the same moment, in which he becomes a trustee, not to manage for the benefit and advantage of himself " (*h*). Cottenham, L.C., said the object of the rule which does not allow a trustee to put himself in a situation where his interest would be inconsistent with his duty, is " to secure the due execution of the duty which the trustee takes upon himself to perform " (*i*). It can therefore be safely affirmed, in spite of the *dicta* to the contrary, that undue influence is beside the point where a trustee deals with his beneficiary over the trust property. Clearly it cannot be supposed that trustees in general exercise personal influence and ascendancy.

It follows from this that there is no reason for impeaching a bargain between beneficiary and trustee where it is not connected with his trusteeship. If such a transaction is questioned " that, like every other transaction, is open to be impeached on the ground of fraud; but this fraud must not be of that species which is referable to dealings between trustee and *cestui que trust*, but only of that species on account of which a transaction between ordinary vendors and purchasers might be set aside " (*k*). The true position is well explained by Lord Cranworth : " I believe, if the principle is examined, that the fiduciary relation gives a power of influence : but I could suggest fifty cases of fiduciary relation where the principle will not apply at all. If a man makes me

(*e*) In *Hatch* v. *Hatch* (1804), 9 Ves. 292, 296 (Lord Eldon), in Brougham, L.C.'s copious judgment in *Hunter* v. *Atkins*, 3 My. & K. 113, 135, and *Liles* v. *Terry*, [1895] 2 Q. B. 679, 686 (Kay, L.J.).

(*f*) *Wright* v. *Morgan*, [1926] A. C. 788, 797.

(*g*) *Fox* v. *Mackreth* (1788), 2 Bro. C. C. 400, and Eldon's decisions in *Ex p. Lacey*, 6 Ves. 625; *Ex p. James*, 8 Ves. 337; *Coles* v. *Trecothick*, 9 Ves. 234; and *Ex p. Bennett*, 10 Ves. 380.

(*h*) *Ex p. Lacey*, 6 Ves. 625, 626.

(*i*) *Knight* v. *Marjoribanks* (1849), 2 Mac. & G. 10, 12; 2 Ha. & Tw. 308.

(*k*) *Ibid.* 15.

trustee of an estate, to pay certain securities, and then ultimately to stand possessed of it for him, we deal with one another in purchase, or in any other way, perfectly at arm's length. I have no influence over him because I am his trustee. It is only a particular sort of trusteeship that gives influence" (*l*).

It seems reasonable to conclude that gifts should not be more unfavourably treated than bargains. There is no reason to suspect a gift to a trustee if a transaction for value is not suspect. Yet Lord Eldon thought that the same protection ought, in this respect, to be given to a beneficiary as to a client, a child, and a ward. "It is almost impossible", he said (*m*), "in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand, purporting to be bounty" for "instead of the spontaneous act of a friend, uninfluenced, it may be the impulse of a mind misled by undue kindness." But the case in which this opinion was expressed was only, in his own words, "the naked case of a ward under the dominion of her guardian" (*n*). There is no doubt that the rule of undue influence will avoid a gift in such a case. Nor is a decision of Lord Hardwicke (*o*) which Lord Eldon quotes in point, for that also concerned a gift to a guardian. When Lord Hardwicke said (*p*) that the rule applied "where a man acts as guardian, or trustee in the nature of a guardian, for an infant" and takes a gift after his coming of age, he is simply stating the ordinary principle of undue influence: just as it applies to a person *in loco parentis* as well as to a parent, it applies to a person acting as guardian as well as to a guardian proper. There is no reason to extend it to trustees because the acting guardian is a trustee.

In this connection Romilly, M.R.'s, remark (*q*) that "a *cestui que trust* cannot give a benefit to a trustee" may be quoted, but the case concerned a purchase. In *Grosvenor* v. *Sherratt*, another case of purchase, a further *dictum* of the same Judge covered a gift made at the instance of an executor, but he was content to say (*r*) that it was "almost impossible" for it to stand. *Barrett* v. *Hartley* (*s*) was a case where a trustee, who was also a mortgagee, tried to exact remuneration for his services under the name of bonus. It was disallowed for this reason, as well as because he was a mortgagee, but Stuart, V.-C., indulging

(*l*) *Smith* v. *Kay*, 7 H. L. Cas. 750, 771.
(*m*) *Hatch* v. *Hatch* (1804), 9 Ves. 292, 296.
(*n*) *Ibid.* 297.
(*o*) *Hylton* v. *Hylton* (1754), 2 Ves. Sen. 547.
(*p*) *Ibid.* 548.
(*q*) *Vaughton* v. *Noble* (1861), 30 Beav. 34, 39.
(*r*) (1860), 28 Beav. 659, 665.
(*s*) L. R. 2 Eq. 789.

his usual taste, gave as a further reason that it was obtained by "pressure" negativing consent (*t*). In *Re Blake* (*u*) Kay, J., said that "a gift from a *cestui que trust* to a trustee, even where the parties are in the relation of wife and husband, can only be supported by very clear and strong evidence". The question at issue was whether a wife had intended to make an absolute gift or only a loan of property of which her husband was trustee for her. The "clear and strong evidence" was required only to prove her intention to give: not to rebut any presumption against the gift. There is, of course, no presumption of undue influence in the relation of husband and wife and this case is no authority for saying that there is in the relation of trustee and beneficiary. Although Kay, J., also mentioned the fact that there had been no independent advice, this seems to mean simply that the presence of a neutral adviser would strengthen the evidence of an intention to give, for the Judge concludes, "the evidence does not seem to me sufficiently cogent to destroy the trust" (*x*). It may be reasonable to insist on clear evidence of intention where a beneficiary makes a gift to his trustee, especially if the gift is of the trust property, for a gift may easily be remuneration in disguise. But there is no authority for saying that there is a presumption against the gift. The doctrine of undue influence, which operates in spite of the intention of the donor, does not apply to the relation of trustee and beneficiary.

It is submitted that the following conclusions may be drawn:

(1) The doctrine of undue influence is distinct from that of fiduciary relationship. The one is based on the misuse of influence, the other on the abuse of confidence.

(2) The relationship of solicitor and client is a fiduciary one involving, somewhat anomalously, both confidence and influence. Abuse of confidence is the ground of interference with transactions for value; undue influence is the ground of interference with gifts.

(3) Undue influence is not presumed in the fiduciary relationship of either agent and principal or trustee and beneficiary. For this reason there is no presumption against gifts in these relationships, though transactions for value will be scrutinised on the ground of abuse of confidence.

(4) The ordinary principle of undue influence will nevertheless apply if there is some additional factor to justify it, such as guardianship, spiritual office, or *de facto* influence.

(*t*) *Ibid.* 798.
(*u*) 60 L. T. 663, 664.
(*x*) *Ibid.*

CONVEYANCING WITH REGISTERED LAND.

(*Continued from Vol.* 2.)

By F. R. Crane, LL.B., Solicitor.

The Land Registration Fee Order, 1939, dated July 24, 1939 (operating from August 14, 1939), which is dealt with elsewhere in this issue (*post*, p. 308), has increased considerably in non-compulsory areas the fees on first registration and to a lesser extent in both compulsory and non-compulsory areas those on dealings, the increase in non-compulsory areas being greater. In an article in the Solicitors Journal, Sir John Stewart-Wallace, the Chief Land Registrar, says the adjustment is necessary because in non-compulsory areas only building estates or " bad lives " are registered. In the article on First Registration (*ante*, Vol. 2, pp. 112, 113) these cases were suggested as showing definite advantages from registration.

IV.—Mortgages.

This article deals with charges of registered land to secure money. The Charges Register which forms part of the Land Register (*ante*, Vol. 2, p. 46) also contains entries relating to other matters, such as restrictive covenants or the existence of settled land, and therefore " Mortgages " has seemed the best title. Nevertheless, where the Act and Rules refer to charges that term will be used. It may be convenient to repeat here that mention in these articles of sections or rules without further particulars refer to the Land Registration Act, 1925, and the Land Registration Rules, 1925.

The Act and Rules permit of five types of mortgage of registered land: (1) a registered charge (sections 25, 26); (2) a mortgage protected by a special mortgage caution (section 106); (3) a deposit of the Land Certificate protected by notice (section 66); (4) an equitable charge (sections 49, 59); and (5) a sub-charge (section 36).

The registered charge is most commonly used in practice (except by banks, which very frequently rely on a deposit of the Land Certificate protected by notice), and will therefore be considered in some detail from the point of view of the practitioner

called upon to effect a mortgage of registered land. The special characteristics of the other four types of charge will then be dealt with.

As a preliminary, however, it seems desirable to state that the general effect of a registered charge is that of a charge by way of legal mortgage of unregistered land. By section 87 of the Law of Property Act, 1925, a chargee by way of legal mortgage has all the remedies of a mortgagee by demise including the right to possession. A properly advised mortgagee should therefore have approximately the same rights whether the title to his security is registered or not, but to attain this result various precautions in drafting must be taken and some differences seem inevitable.

(1) *The Registered Charge.*

(a) *Contract for loan and investigation of title.*

As to the contract, nothing need be added to the points considered under the head Transfer on Sale (*ante*, Vol. 2, pp. 242—256).

Much the same remark applies to Investigation of Title (*ante*, Vol. 2, pp. 342—351). It is specifically stated in section 110, however, that the restrictions therein contained on the abstract to be supplied are not to apply to a chargee, who is therefore free to make such inquiries as he thinks fit. It is thought that in practice chargees are generally, and rightly, satisfied with the abstract which must be provided for a purchaser, who is affected only by overriding interests and entries protected on the register (sections 20, 23). The matter is not as clear as it might be because although the term " purchaser " includes a chargee (section 3 (xxi)) the sections (18—20 for freeholds and 21—24 for leaseholds) setting out the powers of a registered proprietor and the effect of dispositions do not deal with charges, which are separately provided for by sections 25—36. A charge, like any other registered disposition, has to be completed by entry on the register (section 26 (1)) and is subject to the special provisions of the Act (sections 6, 7 and 10—12) where the title is good leasehold possessory or qualified (section 26 (3)); further, it takes effect from the delivery of the deed but subject to any interests whenever created which are protected on the register before registration of the charge (section 27 (3)). (As to this provision, see below—Effect of Charge.) By Rule 148, dealing with the power of sale, a disposition by a chargee has the same effect as one under sections 20, 23 and 40 and is subject only to overriding interests (if any) and interests protected on the register which have priority to the charge.

(Interests inferior to the charge are of course overridden—section 34 (4).) It would be possible, of course, to have a state of affairs in which a prior encumbrancer, unprotected on the register, could enforce his interest against a registered chargee—*e.g.*, one with actual notice—but would have no right against the land if this was sold. It is thought that such a construction is unlikely and it is submitted that although the Act and Rules are somewhat awkwardly expressed, the provisions just considered make clear that a chargee is in no worse position than a purchaser and is therefore subject only to overriding interests (see section 70) and interests protected on the register.

Attention should be drawn to *Re Leighton's Conveyance*, [1937] Ch. 149, where charges entered into by a registered proprietor were held valid, although the transfer to the proprietor was set aside on the ground of fraud. Unfortunately the case was only reported on a point relating to costs, and therefore is not of much authority on the general position.

(b) *Form of the charge.*

General rules relating to form.

Section 25 (2) permits a charge to be in any form, provided, first, that the land is described by reference to the register, or in any manner sufficient for identification without reference to another document and, secondly, that the charge does not refer to any other interest affecting the land which (i) would have priority over the same and is not registered or protected on the register and (ii) is not an overriding interest.

As regards the description of the land, this was fully discussed under Transfer on Sale (*ante*, Vol. 2, pp. 242—247 and 353—355). A chargee has of course the advantage, as compared with a purchaser, that even if the land is incorrectly described it may yet be an adequate security, or alternatively it may be possible to obtain repayment by calling in the charge.

As regards the second proviso, it seems clear that the section refers to charges or interests which if registered or protected would have priority, but which in the absence of such registration or protection are postponed in accordance with section 29 (see below, Priority). For example, if A charges Blackacre first to B and then to C, the charge to C must not recite that to B unless the latter is registered. The object of the rule seems to be to prevent informal and perhaps accidental registration of charges.

If, however, the other charge is an overriding interest it may be mentioned (section 25 (2), proviso (b) (ii)) because a chargee or

transferee will take subject to it in any event (section 70). For example, local land charges are overriding interests till protected on the register (section 70 (1) (i)) and therefore reference could properly be made to an arrangement for retention of part of the advance till road charges had been paid. If there are no actual road charges, but the vendor has to make up the road before the purchaser-mortgagor gets his full advance—a not uncommon case in practice—the matter seems to come under the head of further advances (see below). Any provision barring the chargee from transferring the charge or from requiring its cessation to be noted, or which purports to affect land other than that in respect of which the charge is registered, is void (section 25 (3) (i) and (ii) and see Consolidation, below).

Covenants implied in all registered charges unless varied.

Unless there is a contrary entry on the register, section 28 implies a covenant by the proprietor of the land at the creation of the charge to pay the principal and interest at the appointed time—that is, the date for redemption—(section 28 (1) (a)) and if the principal is not then paid to pay interest half-yearly (section 28 (1) (b)). If the land is leasehold, there is an additional implied covenant to pay the rent, observe the covenants and keep the chargee indemnified (section 28 (2)).

The first two implied covenants will frequently require to be varied or even excluded—*e.g.*, if settled land is charged. The registration of a charge containing different stipulations is a sufficient contrary entry (Rule 140) because a copy of the charge is stitched into the Charge Certificate and may also be inspected at the Registry. The terms of the charge will in consequence be known on any subsequent dealing.

Prescribed form of charge.

By Rule 139, Form 45 set out below *may* be used:—

"(Date.) In consideration of pounds (£) I A B of, etc., hereby charge the land comprised in the title above referred to with the payment to C D of, etc., on the of 19 of the principal sum of £ with interest at per cent. per annum payable [half-yearly, quarterly] on the of , etc., in every year."

The usual heading of district, title number, and property (*ante*, Vol. 2, pp. 45, 46) must be given and the document must be duly executed and the plan (if any) signed.

The form is obviously extremely simple and contains none of the provisions usually inserted in mortgages. For example, there

is no receipt clause. The Schedule to the Rules itself adds to Form 45 over a page of possible amendments, some of which point a moral by being headed "Stipulations negativing the covenants implied in charges by section 28 of the Act". It is submitted that the use of the prescribed form without variation may give rise to difficulty even in the simplest case and that there should be included in a charge of registered land all those provisions which are regarded as necessary in mortgages of unregistered land.

Some law stationers sell a form consisting of a sheet of folded paper of brief size, thus making two foolscap sheets. On the front page are spaces for stamps and fees, the usual heading and the prescribed form with a paragraph incorporating any additional clauses set out on the three following pages, where the usual provisions may be inserted. No objection seems to be raised in principle, or by the Registry, to this form, although ordinary typing on foolscap is equally satisfactory, provided the proper headings are inserted and space for stamps and fees left.

Form of charge.

It is now proposed to go through the points usually requiring consideration in drafting a charge, assuming the prescribed form is not followed.

Heading.—This has already been mentioned (and see *ante*, Vol. 2, p. 352).

Consideration and receipt clause.—The prescribed form is often followed to the extent of commencing with a statement of the amount of the loan, and it is desirable to add a receipt clause in the usual form (and see Further Advances, below).

Parties.—It is usual to continue with the operative part without a formal statement of the parties, unless these are numerous.

Capacity of parties.—This was not considered in any detail under Transfer on Sale because by the general law a purchaser is usually protected provided he gives the best price and, in some cases, pays his money to two trustees or a trust corporation; whether the latter is necessary in registered conveyancing will appear from a restriction on the register (see Rule 58). Fiduciary owners may only charge for limited purposes, however (see sections 16 and 71, Settled Land Act, 1925), and it is not easy to determine precisely what inquiries a chargee, who is not restricted in this connection, should make.

(a) *Borrowers*: (1) *Estate owners under Settled Land Act and trustees for sale.*—After considerable hesitation, it has been thought best to postpone detailed discussion of these classes until a subsequent article on Settlements generally. Although this decision

makes the present article to some extent incomplete, it is submitted, first, that the provisions affecting capacity are more satisfactorily considered in relation to settlements as a whole, and, secondly, that omission now obviates repetition later. It may here be said briefly that restrictions requiring payment of capital moneys to two trustees or a trust corporation, and forbidding dispositions outside the Settled Land Act, will appear on the register and the chargee must, it is thought, undertake the responsibility of ensuring that these restrictions are complied with, if necessary by obtaining the Registrar's approval of the draft document (fee 5s.), or of the proposed transaction under section 89 (fee £1 1s.). It may be added that the whole problem is fully discussed in Potter, *Conveyancing under Land Registration Act*, at pp. 198—203.

(2) *Personal representatives.* — Personal representatives registered in the place of a deceased proprietor (section 41 (1)) hold upon the trusts and for the purposes applicable by the general law, subject to any minor interest to which the deceased was subject but otherwise as if they had given valuable consideration (section 43). A note of their capacity will be entered on the register (Rule 168 (1)). By the general law personal representatives may charge land for the purposes of administration (sections 39, 40, A. E. A., 1925), but a purchaser—including a chargee—is not concerned to see whether the debts, etc., have been paid (section 36 (8), A. E. A., 1925). These provisions seem equally applicable to registered land (see Rule 170 (5)).

Personal representatives, as persons entitled to be registered, may make dispositions, including charges, before registration (section 37, Rules 81 and 170 (1)). If this is done the probate or letters of administration must be lodged in the Registry with the charge (Rule 81); this will apparently amount to registration by the personal representatives of their title (Rule 81), so that a purchaser from the chargee would not be concerned to see the probate. If there should be any doubt as to the personal representatives' title the chargee should insist on registration of the probate before creation of the charge; for example, if general representatives have a grant where the Registrar might think special ones ought to have it, or if the duty of the general representatives will be to transfer to trustees of the settlement (see *Re John Thomas*, [1939] Ch. 513). In both these cases a Settled Land Act restriction will already be on the register.

(3) *Companies.*—The lender must, of course, be satisfied from the memorandum and articles that the company has power to borrow money. Charges by companies must also be registered under section 79 of the Companies Act, 1929; unless a certificate

of such registration is produced the Land Registrar must note on the register that the Companies Act applies (Rule 145). The practice used to be to lodge the charge at the Land Registry, whence it was automatically forwarded to the Companies Registrar. Nowadays, however, the Registry required the charge to be registered under the Companies Act *before* the application is lodged at the Land Registry. The fourteen days' protection given by the official search is of assistance here.

It appears from Potter, *Conveyancing under Land Registration Act*, p. 163, that in the case of debentures the practice is to lodge at the Land Registry the certificate of issue or the trust deed marked as registered under the Companies Act.

Small holdings.—Rule 143 provides that charges under the Small Holdings Acts shall be in Forms 48—50, which are, however, obsolete, as the Small Holdings Act, 1926, requires the loan to be secured by a mortgage providing for repayment by instalments or a terminable annuity. Form LIV in Potter, *Conveyancing under Land Registration Act*, follows the Act of 1926, and it is respectfully submitted that this is the proper course.

(b) *Lenders*: (1) *Building societies.*—It has seemed more convenient to group the special points relating to building societies under a separate head later in this article, since they relate to procedure rather than capacity.

(2) *Trustees.*—By section 32, where a charge is registered in the names of two or more persons (whether jointly or in undivided shares) the mortgage term is to vest in them as joint tenants so that the survivor or his personal representatives can give receipts, even though the beneficial interests be held in undivided shares. Rule 146 adds that if money is advanced by two or more persons not on joint account they shall be entered as joint proprietors although the register may show the shares in which the money is held.

On the interpretation of these provisions authorities differ. Brickdale states (4th ed.), p. 129, that the Act and Rules do not prevent a charge being held in undivided shares and that any number of persons may be entered as proprietors of a charge, whereas in Potter, *Conveyancing under Land Registration Act* (at pp. 144—146), this view is doubted. Without going into the problems involved, it would seem that in practice it is safest to include a joint account clause and not to charge to more than four persons. If this is done it is submitted that a purchaser will not be concerned with the beneficial interests in the mortgage money, even though these are referred to in the charge and therefore (Rule 140) appear on the register (section 32, Rule 146; and see sections 111 and 113,

Law of Property Act, 1925). The writer has known the inclusion of a joint account clause followed by trusts of the mortgage money give rise to difficulty in unregistered conveyancing, since section 111 of the Law of Property Act, 1925, giving a survivor power to give receipts where there is a joint account clause takes effect " subject to any contrary intention expressed in the mortgage ". It is submitted that this problem has been solved for registered conveyancing.

Covenants for title.—These were fully discussed in connection with the transfer on sale (*ante*, Vol. 2, pp. 354–6).

Charge of the land.—The prescribed form (No. 45) " charges the land with the repayment ", but an express demise in accordance with section 85 of the Law of Property Act, 1925, may be made if desired (section 27 (2)). As to the effect, see below—Effect of Charge.

Date for redemption.—This appears clearly in the prescribed form, so that a purchaser will know when money is due at law and the statutory powers have arisen (see section 101, L. P. A., 1925). Where the form is adapted to provide for repayment by instalments there must be considered, as in unregistered conveyancing, the question of how a purchaser is to be satisfied that some money is due. One instalment in arrear is enough (*Payne* v. *Cardiff R. D. C.*, [1932] 1 K. B. 241), but the problem is one of proof, which can be solved by drafting precautions in the first place.

Covenant to pay principal and interest.—As has been noted, the implied covenants under section 28 will normally require variation, which is most easily done by inserting an express covenant containing the desired terms.

Further advances.—These may conveniently be considered in connection with the covenant to pay, as they will be dealt with therein.

Section 94 of the Law of Property Act, 1925, does not apply to registered land, and consequently there are in relation to tacking certain differences between registered and unregistered conveyancing.

Where there is an obligation, noted on the register (this will be automatic—Rule 140), to make further advances, any subsequent charge takes effect subject to further advances made in pursuance of the obligation (section 30 (3)—added, but not retrospectively, by section 5, L. P. (Am.) A., 1926).

Where there is no such obligation but the charge secures further advances, the Registrar must, before making any entry which would prejudicially affect the priority of any such further advance,

give notice by registered post to the chargee at his address for service (see Rule 315) and a further advance made before the time when the letter would normally be received has priority (section 30 (1)). If the Registrar or the Post Office are guilty of any failure in relation to the notice in consequence of which the chargee suffers loss he is entitled to indemnity, *unless* the loss is due to an omission to register or amend the address for service (section 30 (2)). The chargee must, therefore, see that this address, which is the one entered on the register, is kept up to date, and should not make any advance if it is possible for a letter to have been received but not brought to his notice. A person is entitled to have three addresses registered, including, if he thinks fit, that of his solicitors (Rule 315 (2)).

Apart from the above sections, it seems that the ordinary rules of priority depending on time of registration apply (see section 29 and below) which means the end of the doctrine of *tabula in naufragio*. It will be observed that the Land Registration Act makes no differentiation such as is contained in section 94 of the Law of Property Act, 1925, between banks and other lenders, but this is unnecessary since all lenders whose charges cover further advances receive from the Registrar actual notice of any proposed second charge.

Priority.—Subject to any contrary entry, registered charges rank according to date of registration and not according to order of creation (section 29). It will be observed that there is no reference to a *bona fide* purchaser as there is in section 13 of the Land Charges Act, 1925. It is thought that in unregistered conveyancing, despite the reference to *bona fides*, a subsequent incumbrancer with actual notice of a prior charge not protected by the title deeds or under the Land Charges Act, 1925, has priority, at any rate if his own charge is properly protected. It is submitted that in registered conveyancing section 29 undoubtedly gives priority to the charge first registered, whatever the knowledge of the chargee. The possibility of injustice occurring in this connection seems inevitable if a system of registration is to work satisfactorily and in practice a prospective chargee with actual notice of an unregistered charge would probably hold back till the position was cleared. It may be noted that an official search giving fourteen days' priority (see *ante*, Vol. 2, pp. 344—349) gives complete protection to prospective chargees in normal circumstances.

Consolidation.—The only provision referring in terms to consolidation is Rule 154, which states that where a charge reserves a right to consolidate, it is not on that account only to be registered against land not expressly described in it, but that where the right

to consolidate against a specified charge, or an application is made to register in respect of a separate charge, the Registrar shall enter notice that the charges are consolidated on production of the land certificates of all the titles affected.

In *Wolstenholme & Cherry's Conveyancing Statutes* it is stated (12th ed., Vol. 1, at p. 387, note to section 93, L. P. A., 1925) that the rights of a chargee of registered land are the same, as regards consolidation, as those of a mortgagee of unregistered land. The authority given for this proposition is section 27, whereby a registered charge has the effect of a charge by way of legal mortgage, and section 34 (1) which, subject to any contrary entry, gives the proprietor of a charge all the powers conferred by law on a legal mortgagee (see also sections 18 (4) and 21 (4)). Consolidation under the general law is said to be possible, provided the right is reserved in one of the mortgages (section 93, L. P. A., 1925) and the mortgages were all made by the same mortgagor who had all the equities in his hands at one time, when all the equities are in one hand and all the mortgages are in one hand, or after this has happened, the equities have separated (Cheshire, *Modern Real Property* (4th ed.), at p. 606; *Pledge* v. *White*, [1896] A. C. 187). Rule 154 would not appear to affect the position as against a holder of all the equities; on his seeking to pay off he could be required to pay all or none. It is submitted, however, that if such a holder sold one equity, the purchaser would not be subject to consolidation unless a notice had been entered under Rule 154, because of the provisions of sections 20 and 23 (see *ante*, Vol. 2, pp. 355–6). If this view is correct a possible cause of hardship is eliminated.

It may be, however, that the Land Registration Act has modified the law of consolidation far more substantially. It is suggested in Potter, *Conveyancing under Land Registration Act* (at pp. 147–8), that section 25 (3) (ii), rendering void any provision in a charge purporting to affect land other than that in respect of which the charge is expressly registered, applies to a general reservation of the right to consolidate. That is to say, consolidation may be possible only where in the second (or last) mortgage the right to consolidate with specified charges is reserved, and a note is entered under Rule 154.

It seems doubtful whether the Court would hold that a general reservation of the right to consolidate is caught by section 25 (3) (ii). No other land is affected till the necessary conditions for consolidation are fulfilled (which may never happen) and a purchaser of one equity only seems to get adequate protection from Rule 156. It is submitted that in practice the first view of consolidation set out

above should be taken as correct until the contrary is decided, although it would be unwise to allow a client to place too much reliance on a right to consolidate registered charges.

Power of leasing.—A chargor in possession, or a chargee who has taken possession or appointed a receiver, has the powers of leasing and accepting surrenders conferred by sections 99 and 100 of the Law of Property Act, 1925. Restrictions on this power will frequently be inserted in the charge, and of course this will operate as a contrary entry (Rule 140); as for the effect of making the mortgagee's consent necessary, see *Iron Trades Association* v. *Union Land and House Investors*, [1937] Ch. 313.

Other mortgage clauses.—The usual provisions for keeping up the security, insurance, etc., should be inserted.

Execution and attestation.—The charge should be executed in the usual way, any plan being signed by both parties (Rule 79). Any power of attorney under which a document is executed must be lodged at the Registry (Rule 82).

(c) *Completion and registration of charge.*

Official search.—This should be made on Form 94 to obtain the fourteen days' priority conferred thereby. For a full discussion see *ante*, Vol. 2, pp. 344—349.

Completion and registration.—The same points will arise and the same steps have to be taken as on a transfer, for which see *ante*, Vol. 2, pp. 356—359, and to try to summarise again here would, it is felt, be confusing.

Two special points applying to charges must be noted: First, a certified copy of the charge must always be lodged in addition to the other documents. Secondly, in the case of a second or subsequent charge the Land Certificate will already be in the Registry and the prior Charge Certificate need not be brought in.

Issue of Charge Certificate.—This takes the same form as a Land Certificate, except that the last entry in the Charges Register will give short particulars of the charge, a copy of which will also be stitched inside the cover.

Fees.—These are the same as on a transfer (see L. R. Fee Order, 1939), but there are several possible abatements (L. R. Fee Orders, 1930 and 1939) which are not cumulative but alternatives at the applicant's choice (Abatement 14), and must be claimed at the time of registration (L. R. Fee Order, 1939). The relevant abatements are:—

No. 1.—(a) No fee on a charge lodged with an application for first registration, and (b) discretionary abatement if the charge is lodged before the first Land Certificate is issued.

No. 2.—Charge by transferee for value accompanying transfer—half fee on the charge.

No. 3.—Charge of registered and unregistered land—fee on proportion of loan according to value of the land.

No. 4.—Additional or substituted security—1s. per £100 up to either £2 (Fee Order, 1930, para. vi), or the fee on a charge for the value of the land after deducting existing charges.

No. 5.—Transfer and discharge with new charge to same proprietor—fee for transfer to be based on consideration after deduction of amount of new charge.

No. 6.—Discharge and new charge to same proprietor—1s. per £100, up to £2 (Fee Order, para. vi), on so much of new loan as is not in excess of old one.

Costs.—These are the same as on transfers (Solicitors Remuneration (Registered Land) Order, 1925–36, and *ante*, Vol. 2, pp. 359, 360), but where a solicitor acts for the proprietor of the land and the chargee, he is entitled to the full chargee's costs, and one-half of the proprietor's costs up to £5,000, and on any excess over £5,000 one-fourth (Order of 1925, Rule 1 (k)).

(d) *Effect of the charge.*

A charge must be completed by registration (section 26 (1)) and then has the effect of a charge by way of legal mortgage of unregistered land (section 27 (1)), subject to the usual qualifications for good leasehold, possessory or qualified titles (section 26 (3)), to overriding interests (section 70), and to any interests (other than those of the proprietor of the land) registered —whenever created—before the charge (section 27 (3)); that is, the chargee has the remedies of an ordinary mortgagee by demise (section 34, L. R. A., and section 87, Law of Property Act, 1925; and see Realisation of Security, below). An express demise may be used if desired (section 27 (2)). Any such demise, sub-demise or charge takes effect from the delivery of the deed subject to any entries made before its registration (section 27 (3)). This might affect priority, normally determined by registration (section 29) as between two or more unregistered charges (see *Brickdale*, 3rd ed., p. 667, *Potter*, p. 143, and section 101 (3)).

(e) *Alteration of a registered charge.*

A proprietor of a charge may alter it by deed with the consent (to be shown by execution of the deed—Rule 150) of the proprietor of the land and of all chargees of equal or inferior priority affected by the alteration (section 31 (1)). The alteration must be com-

pleted by registration (section 31 (3)). The prescribed form (Rule 150, Form 51) is merely a statement that the parties apply for alteration "as follows" of a specified charge.

(f) *Transfer of a registered charge.*

A proprietor of a registered charge may always transfer it (sections 33 (1) and 25 (3) (i)). The prescribed form (Rule 153, Form 54) is: "In consideration of, etc., I, A B of, etc., hereby transfer to C D of, etc., the charge dated, etc., and registered, etc., of which I am the proprietor." If part only is transferred the words "as to the sum of £ " are added; in this case the entire charge is registered jointly but the register shows the shares (note to Form 54, and see section 32 and *ante*, p. 295). Any additional provisions, if desired, may be inserted. The transfer must be completed by registration and until then the transferor is deemed to remain proprietor (section 33 (2)). A registered transferee for valuable consideration of a charge is not to be affected by any irregularity or invalidity in the original charge itself of which he did not have notice when he took the transfer (section 33 (3)). It is not clear whether this would assist a transferee of a charge made by a Settled Land Act owner outside his powers, for the restriction on the register might well be deemed notice. It would seem safest to make the same investigation as an original chargee (*ante*, p. 290, and see Settlements).

The transfer will be lodged for registration under the usual application cover, and the fee is 1s. per £100 or part thereof up to a maximum of £2 (L. R. Fee Order, 1930, para. vi).

Costs are on the transfer scale, unless the solicitor acted on the creation of the charge or a previous transfer, when item charges apply, though a full negotiating fee is chargeable (Solicitors' Remuneration Order, 1925, para 1 (i)).

(g) *Discharge of registered charge.*

The prescribed form (Rule 151, Form 53) after the usual heading, runs: "(Date.) I, A B of, etc., hereby admit that the charge dated, etc., and registered, etc., of which I am the proprietor, has been discharged. (To be signed by the proprietor of the charge and attested.)" Notes to the form provide for variation if part only of the land or charge is discharged. Normally this form will be used, but the Registrar may accept any other proof (Rule 151). The entry on the register will be cancelled or varied as the case may be and the charge is deemed to have ceased in whole or in part (section 35 (1)); any term is merged and extinguished (section 35 (2)).

The Charge Certificate and the discharge will be lodged under the usual application cover, and unless there are other outstanding charges a Land Certificate issued to the proprietor of the land. There is no fee, and furthermore the Registry will accept a discharge merely signed over a 2d. stamp if the prescribed form is used.

Rule 167 provides a prescribed form (Form 55) for a combined transfer and discharge the gist of which is that the vendor "transfers to E F the land" and the chargee "hereby discharges the same from the charge dated, etc.". Normally, it is thought, a separate discharge is preferable, as the chargee will not be concerned with the transfer.

Item remuneration applies (Solicitors' Remuneration Order, 1925, para. 1 (9)).

(2) *Mortgage off the Register protected by a Caution.*

This method of mortgage is rarely used in practice, especially as the caution must be the *ad valorem* fee at the same rate as a registered charge (L. R. Fee Order, 1930, para. v (vi)), and will therefore be dealt with as shortly as possible.

The mortgage may be in any form, provided the land is identifiable without reference to any other document, and if by deed may be protected by a special mortgage caution (section 106 (1), (2) and (3)). The prescribed form for the caution (Rule 223, Form 64) runs:—

"(Heading) (Date) A B, of, etc. (Mortgagee) requires that no dealing on the part of the proprietor of the land shall be registered until notice has been served on him. This Caution is for the protection of a Mortgage by Deed dated, etc., in favour of A B to secure £ and interest payable on the 19 ."

In addition to this caution there must be lodged under the usual application cover the Land Certificate, mortgage and a copy thereof (Rule 223 (2)). The mortgage is returned with a note of the registration endorsed (Rule 223 (6)). The caution entered runs: "Mortgage Caution in favour of A B to protect a mortgage (particulars) (copy filed)" (Rule 223, Form 67).

The mortgagee will get notice of any transaction, but the caution is not warned off and any dealing is subject to the mortgagee's rights (Rule 225; section 54). He thus has the advantage, over a registered chargee, of getting notice of any second charge. The disadvantage is that the power of sale cannot be exercised till the mortgage itself is registered, when it has the same priority as the caution (section 106 (5) (6)).

The caution is withdrawn on application, or vacated on evidence

of payment off (Rule 224). The form for withdrawal (Rule 224, Form 71) is:—

"I, A B, of, etc., hereby apply to withdraw the caution registered in my name on (date) against the title (or charge) above referred to (to be signed by the applicant or his solicitor)."

(3) *Deposit of Land Certificate protected by Notice.*

Two separate points have to be considered; the effect between the parties of a deposit, and the method of protecting the depositee against subsequent dispositions.

A proprietor of any registered land or charge may, subject to overriding interests, to any contrary entry, and to any interests registered or protected on the register at the date of the deposit, create a lien by deposit of the Land or Charge Certificate; such a lien has the effect of a deposit of title deeds of unregistered land by a beneficial owner (section 66)—that is, it amounts to an agreement to create a legal mortgage (*Carter* v. *Wake* (1877), 4 Ch. D. 605). A depositee does not come within section 34 and therefore if he wishes to sell must, as in unregistered conveyancing, rely upon a memorandum; the usual power of attorney to convey the depositor's estate would appear to be quite satisfactory, provided the document creating the power is produced and a copy lodged on the sale (Rule 82). In practice banks use their normal memorandum under seal.

The depositee is protected against third parties by notice entered on the register (Rules 239—246). He may give the Registrar notice of the deposit by registered letter or otherwise (there is no prescribed form) and must include his name, address and particulars of the district, parish and title number from the Land Certificate (Rule 239). The Registrar acknowledges the notice and enters it on the register (Rule 239 (3)) when it has the effect of an ordinary caution under section 54, entitling the depositee to notice of any transaction. If no objection is made the depositee will be postponed (section 55); the special advantages of a mortgage caution do not apply.

The reference in section 66 to interests protected "at the date of the deposit" should not, it is submitted, be construed so as to give to a depositee, who fails to give the notice provided for by the Rules, priority over any interest subsequently entered on the Register. On the other hand, most dealings require the Land Certificate to be lodged in the Registry, and it is not clear whether a purchaser would be postponed if he found that the vendor had not got the Land Certificate but no notice was on the register. If a purchaser sees that the Land Certificate is handed over, or lodged

in the Registry prior to completion, and makes an official search to get priority, it is thought that a depositee who had not given notice and had allowed the Certificate to be lodged would be estopped (see Rules 292—295, sections 20, 23, and *ante*, Vol. 2, pp. 344—349). Difficult problems would arise if the purchaser failed to make sure of the Land Certificate.

Section 66 is, furthermore, inconsistent, having regard to the possibility of Settled Land Act restrictions, in making a depositee take as if from a beneficial owner yet subject to interests protected on the register. It is therefore suggested that fiduciary owners should always be required to give a registered charge (see Potter, *Conveyancing under Land Registration Act*, pp. 169, 170).

A person who is applying for registration as owner of land or a charge may give a notice of intending deposit (Rules 240, 241) which will have the same effect as a notice of deposit (Rule 242). This will apply where the loan is made on a first registration or transfer, so that the Land Certificate is non-existent or in the Registry. The lender must see that the borrower signs the appropriate notice, and the new Certificate will then be issued to the lender (Rule 242 (2)).

Dealings during the continuance of a deposit were considered, and a form of consent suggested, under Transfer on Sale (*ante*, Vol. 2, pp. 349, 350). It should be noted that on such a dealing the depositee must lodge the Certificate in the Registry if the transaction is to go through; under Rule 244 the Certificate will be returned to the person leaving it or as he may in writing direct.

A withdrawal of a notice of deposit may be in any form, provided it is signed by the depositee or his successor in title, and is accompanied by the Land or Charge Certificate (Rule 246; and see *ante*, Vol. 2, p. 349, and Potter, *Conveyancing under Land Registration Act*, p. 599, Form LXII).

The fee for entry of a notice of deposit is 1s., but consents to dealings and withdrawal are free (section 144 (1) (xi), L. R. Fee Order, 1930, r. 8).

(4) *Equitable Charge.*

A proprietor of registered land can create an equitable charge in such manner as would be effectual in unregistered conveyancing (section 101 (1)), but until protected on the register this will be only a minor interest and liable to be overridden by a disposition for value (section 101 (2), (3)). The protection may apparently be by notice or caution (sections 49, 59, 54 and Rule 190). The prescribed form for a notice is No. 59 (Rule 190) and runs: "I, A B of, etc., being entitled to [particulars of interest] in the land

comprised in the title above referred to by reason of [concise statement of facts or documents] hereby apply for registration of notice thereof. [To be signed by applicant or his solicitor.]" The prescribed form (No. 63) for a caution against dealings is (Rule 215): "A B requires that no dealings with the land above referred to shall be registered until notice has been served on him or his personal representative. (To be signed by the cautioner or his solicitor.)" In both cases the usual heading must be included and evidence (usually the document) in support of the claim be given (Rule 190 and section 54). It would seem that a notice is preferable because there is no possibility of it being warned off after one dealing.

In practice it is thought that this form of charge will be used only for informal second charges, where the Land Certificate cannot be deposited.

The remarks above under Deposit of Land Certificate protected by Notice would seem to apply in regard to dealings during the continuance of, and withdrawal of, notices and cautions protecting equitable charges.

The fee for the registration or cancellation of a caution or notice is normally 10s. (L. R. Fee Order, 1930, Rule VIII).

(5) *Sub-charges.*

What has been said of registered charges applies, *mutatis mutandis*, to sub-charges of registered charges (section 56, Rules 163—166).

A proprietor of a charge may charge the mortgage debt in the same manner as a proprietor of the land can charge the land (Rule 163 (1)) and the proprietor of the sub-charge thus created has the same powers over the land as the owner of the principal charge (Rule 163 (2)). A sub-charge is to be created, transferred, and discharged in the same manner as a charge, the same covenants are implied, and the same rules of priority apply (Rule 164). On creation of a sub-charge the charge certificate must be produced and a note of the sub-charge entered therein (Rule 165) and sub-charge certificates are issued and may be deposited to create liens, etc., like charge certificates (Rule 166 (1)).

The fees on a sub-charge are the same as those on a charge (L. R. Fee Order, 1930, Rule V).

(6) *Building Societies.*

What has been said regarding charges generally applies to those in favour of building societies (see section 25 (1) (b)), but the Rules have made some modifications in procedure to suit the

special requirements of the societies (including friendly and industrial societies).

Since a charge may be in any form (section 25 (2)) the usual printed mortgage is used, the necessary Land Registry heading being indorsed on the back sheet. The land is usually described by reference to the title number, and this is desirable so as to identify it without doubt for the Registrar; further particulars may be added to meet the objections to this type of description mentioned under Transfer on Sale (Vol. 2, at pp. 245, 246).

Rule 92 allows the original mortgage to be returned to the society, provided a certified unstamped copy is lodged. Rule 93 provides that it shall be indorsed with a note of registration, but in practice the mortgage is stitched into the Charge Certificate. A copy of the rules of the society must also be lodged on registration of the charge.

The stitching in of the mortgage means that all its terms are noted (Rule 140) and the printed receipt is available on payment off. If such receipt should not be available the ordinary form of discharge will do (Rule 152, Form 53) if it is signed by the appropriate officers, and has the effect of a receipt under the Building Societies Acts. Attention was drawn in the article on Transfer on Sale (*ante*, Vol. 2, p. 356) to the habit of building societies of refusing to sign or seal receipts until they have actually received the money, and it was mentioned that in such a case the Registrar will usually proceed with registration of the transaction —unless it be only a discharge—pending lodgment of the receipted mortgage.

(7) *Realisation of the Security.*

A chargee has all the powers of an ordinary mortgagee of unregistered land (section 34), but there is some machinery for the exercise of these powers.

Adverse possession.—A proprietor of a charge after acquiring a title by adverse possession under the Limitation Acts may execute a declaration by deed poll to this effect (Rule 149 (1); Sched., Form 52), supported by evidence, and is thereupon entitled to be registered as proprietor of the land with the same consequences as if he were a purchaser for valuable consideration (section 34 (2)). This appears to reverse the doctrine of *Re Nisbett & Potts' Contract*, [1906] 1 Ch. 408. The evidence in support is to be a statutory declaration by an independent trustworthy person as to the entry in possession or receipt of the rents and profits, and the continuance thereof. In addition, the Registrar may require the beneficial title to the equity of redemption to

be proved to show no one is entitled to redeem (Rule 149 (2) (3)). The fee would seem to be 10s. (L. R. Fee Order, 1930, Rule VIII).

Foreclosure.—Where an order for foreclosure absolute is obtained, this must be lodged with the charge certificate under the usual application cover (Rule 147). The mortgagee will then be entered as proprietor of the land, the charge and all inferior entries being cancelled, with the same consequences as if he had been a purchaser for valuable consideration (section 34 (3)). It is suggested in Potter, *Conveyancing under Land Registration Act*, that this does not prevent the foreclosure being re-opened under the ordinary law, and it is respectfully submitted that this view is correct.

A foreclosure order *nisi* would be protected by a caution under section 59 (1), the fee again being 10s.

Sale.—It may be noted that there is a prescribed form for the exercise of a power of sale (Rule 114, Form 31). The only variations from the ordinary form of transfer (*ante*, Vol. 2, pp. 352—355) is that the transferor conveys "in exercise of the power of sale conferred by the charge dated, etc., and registered, etc." the land "discharged from the said charge". He may also be made to convey as mortgagee, thus limiting the covenants for title (Rule 76).

A sale by the Court or under the power of sale shall operate and be completed by registration in the same manner as nearly as may be (subject to alterations on the register affecting the priority of the charge) as a transfer for value by the proprietor of the land (see sections 20, 23) at the time of the registration of the charge which, together with all inferior entries, is cancelled (section 34 (4)). It is pointed out in Potter, *Conveyancing under Land Registration Act*, that the reference to the "time of registration of the charge" might raise a question as to overriding interests—*e.g.*, a lease for twenty-one years properly created during the continuance of the charge—and it is suggested that these would not be affected. Once again it is respectfully submitted that this is correct, and as regards leases (the only case likely to arise) support may be derived from the rules as to the power of leasing (*ante*, p. 299).

Appointment of a receiver.—This will not affect the register until some act is done—*e.g.*, granting of a long lease—which is dependent on the receiver's appointment and requires completion by registration. The appointment of a receiver might induce the Registrar to permit a caution against dealings to be lodged by the chargee (see section 54).

THE LAND REGISTRATION FEE ORDER, 1939, DATED JULY 24, 1939.

First Registrations.

First registrations in compulsory areas.

1. Scale No. 1 set out in Paragraph I of the said Order shall apply only to land situated in compulsory areas.

First registrations in non-compulsory areas.

2. The following new Scale No. 1A shall apply to applications for first registration affecting land situated in non-compulsory areas (whether with Absolute, Good Leasehold or Possessory Titles) falling under Paragraph I of the said Order.

New Scale No. 1A—(*Non-Compulsory Areas*).

Value of Land.	*Fee.*
Not exceeding £250	15s.
Exceeding £250 but not exceeding £500.	15s. for the first £250 and 1s. 6d. for every £25 or part of £25 over £250.
Exceeding £500 but not exceeding £1,000.	£1 10s. for the first £500 and 2s. for every £25 or part of £25 over £500.
Exceeding £1,000 but not exceeding £2,500.	£3 10s. for the first £1,000 and 5s. for every £50 or part of £50 over £1,000.
Exceeding £2,500 but not exceeding £10,000.	£11 for the first £2,500 and 2s. for every £50 or part of £50 over £2,500.
Exceeding £10,000 but not exceeding £100,000.	£26 for the first £10,000 and 2s. for every £100 or part of £100 over £10,000.
Exceeding £100,000	As for £100,000.

First registrations by original lessee and of rack rent leases.

3. Scales Nos. 2 and 3 set out in Paragraphs II and III of the

said Order shall apply to land situated in both compulsory and non-compulsory areas save that in non-compulsory areas the maximum fee under such Scales shall be £116 instead of £59.

Dealings.

Dealings for value and rectification in compulsory areas.

4. The following new Scale No. 4 shall be substituted for Scale No. 4 set out in Paragraph V of the said Order and shall apply only to land situated in compulsory areas.

New Scale No. 4—(Compulsory Areas).

Value of land or amount of charge or mortgage.	*Fee.*
Not exceeding £500	1s. for every £25 or part of £25.
Exceeding £500 but not exceeding £750.	£1 for the first £500 and 1s. 6d. for every £25 or part of £25 over £500.
Exceeding £750 but not exceeding £1,000.	£1 15s. for the first £750 and 2s. 6d. for every £50 or part of £50 over £750.
Exceeding £1,000 but not exceeding £1,500.	£2 7s. 6d. for the first £1,000 and 3s. for every £50 or part of £50 over £1,000.
Exceeding £1,500 but not exceeding £7,000.	£3 17s. 6d. for the first £1,500 and 5s. 6d. for every £100 or part of £100 over £1,500.
Exceeding £7,000 but not exceeding £10,000.	£19 for the first £7,000 and 4s. for every £100 or part of £100 over £7,000.
Exceeding £10,000 but not exceeding £50,000.	£25 for the first £10,000 and 2s. for every £100 or part of £100 over £10,000.
Exceeding £50,000 but not exceeding £100,000.	£65 for the first £50,000 and 10s. for every £1,000 or part of £1,000 over £50,000.
Exceeding £100,000	As for £100,000.

Dealings for value and rectification in non-compulsory areas.

5. The following new Scale No. 4A shall apply to any application affecting land situated in a non-compulsory area falling under Paragraph V of the said Order.

New Scale No. 4A—(Non-Compulsory Areas).

Value of land or amount of charge or mortgage.	*Fee.*
Not exceeding £100	1s. for every £25 or part of £25.
Exceeding £100 but not exceeding £700.	4s. for the first £100 and 1s. 6d. for every £25 or part of £25 over £100.
Exceeding £700 but not exceeding £1,500.	£2 for the first £700 and 2s. 6d. for every £50 or part of £50 over £700.
Exceeding £1,500 but not exceeding £10,000.	£4 for the first £1,500 and 6s. for every £100 or part of £100 over £1,500.
Exceeding £10,000 but not exceeding £50,000.	£29 10s. for the first £10,000 and 2s. 6d. for every £100 or part of £100 over £10,000.
Exceeding £50,000 but not exceeding £100,000.	£79 10s. for the first £50,000 and 20s. for every £1,000 or part of £1,000 over £50,000.
Exceeding £100,000	As for £100,000.

Mining leases.

6. The above new Scale No. 4A shall apply to applications for the first registration of a mining lease instead of Scale No. 4 under Paragraph IV of the said Order.

Scale No. 1A or No. 4A made applicable in certain cases.

7.—(a) In Paragraph VII the words "or 4A" shall be added after the words "No. 4" where they occur.

(b) In Paragraph IX the words "or 1A" shall be added after the words "No. 1".

(c) In Paragraph XIII the words "or 4A" shall be added after the words "No. 4".

(d) In Abatement of Fee of No. 7 the words "or 4A" shall be added after the words "No. 4".

(e) In Fee Order Rule No. 11 (b) the words "or 4A" shall be added after the figure "4" and the words "or 1A" shall be added after the words "No. 1".

8. The following provision shall be added to Abatement No. 14 in the said Order:—

"Any abatement of fees applicable under this Order must be claimed at the same time as application is made for registration; otherwise such abatement cannot be allowed."

THE COUNTRY LAWYER (*a*).

The life of an attorney-at-law in an American small town is not so remote from that of the English country lawyer. The absence of a distinction between Bar and solicitors is less marked in the case of the country lawyer, because few country solicitors do not act as advocates in the local Courts. Furthermore, a solicitor may be sitting one day as clerk to the magistrates or as Registrar and the next appearing as an advocate before a neighbouring bench or the Registrar of a neighbouring county court, where the advocate of yesterday is sitting as clerk or Registrar. Though our country lawyer, Mr. Partridge, never became a Judge, or the surrogate (*b*) he wished to be, this peculiarity appears in the life of the American lawyer.

Much more apparent is the similarity of the life of the country lawyer in both countries. "Specialising is something that the country lawyer knows very little about. He may prefer a certain type of practice. He may become an authority on this or that, just as my father became an authority on probate practice and the law of real estate, but if he is going to make his living from the law he will have to be ready to handle almost anything that comes along." This might well be a description of the legal aspect of the life of an English country solicitor.

Here is another description of the day's work. "And so it would go on all day long—one kind of thing after another. Questions arising under contracts, torts, decedents' estates, domestic relations, negotiable instruments, bailments, fraud and deceit, justifiable error, trespass, ejectment, injunction, mandamus, partition, foreclosure, defamation of character, false arrest, breach of promise to marry, desertion, corporations, partnerships, gifts, guaranties, and covenants running with the land. The range of my father's practice covered the entire field of human emotions and human possessions, human behaviour and human frailty." A few of the terms seem strange, but the story is true of us as of them.

Our author goes on to say, "Many of the questions that came

(*a*) *Country Lawyer, The Story of My Father.* By BELLAMY PARTRIDGE. George G. Harrap & Co., Ltd., London, Toronto, Bombay, Sydney. Price 10s. net.

(*b*) Apparently the equivalent of our District Probate Registrar with wider powers.

to him could be settled with a word. Others required hours of research." "The diversity of legal knowledge with which the country lawyer must be equipped if he is to make even a decent living out of his practice is the most staggering blow that the young practitioner has to face." Here the American lawyer lacks the advantage of resort to counsel's opinion, but so many cases that reach the country lawyer do not warrant this course. It is in such circumstances that we are not surprised to find that one of our country lawyer's most prized possessions was his valuable library. How much time, which means money, is wasted by the English country lawyer if he does not maintain an adequate library of up-to-date text-books is a matter of speculation. It is obvious that the use of libraries at a distance is more wasteful than the expenditure on text-books.

This is a book all lawyers should read. When all is said and done the life of a country lawyer is not primarily a matter of technical law. It demands a sound knowledge of human nature, a wide charity, tact, and an intense interest in the affairs of the community in which he lives. This is equally true on either side of the Atlantic and this book is full of entertainment and instruction.

In these grim and strenuous days it is well to let our thoughts rest on the scene brought to our minds by the English country lawyer. The little market town sweltering in the July sun. The old Georgian house built straight on to the street, which has been the abode of lawyers for generations. The old door is now half open inviting passers-by to enter the cool hall in search of aid and legal refreshment and through it go all sorts and conditions of men; the shopkeeper, the farmer, the squire, and the labourer, each with his problem covering the whole scope of human affairs. The lawyer is the repository of the secrets of the rich and poor, as witness the little black book of our country lawyer which was his private record, so personal that even his partner son learned of it only after many years in the office.

As we pass along the street of our market town on that peaceful summer afternoon the air hums with the busy silence of country life. Insignificant as many of its sounds may be, together they are full of a rich humanity. Such is the common round of the country lawyer in general and our Mr. Partridge in particular. But occasionally the strange and even bizarre comes before him. As a result of a prayer meeting for rain an action was brought by a townsman whose barn was struck in the course of a great storm following within a brief space after the meeting. On what principle of remoteness of damage such an action could lie it does not appear but the reason for dismissing the suit was almost as

peculiar as the commencement of the proceedings. The learned Judge non-suited the plaintiff on the ground that the meeting prayed for rain, but the barn was struck by lightning.

In the days of Mr. Partridge, who began his practice in the late 'sixties, disputes over horses were common and our country lawyer became almost an authority on the diseases of horses. In our day the motor car has taken the place of the horse and the modern lawyer must know the law affecting motor cars and the actions arising from road accidents. But like most country lawyers our country lawyer seems to have preferred to avoid litigation for his clients. "Usually when a client came in with a grievance my father would try to effect a settlement without starting suit." He even took trouble to avoid stirring up the seeds of discords, as witness the story of the herbalist. This story is too long to tell here, but the old lawyer discomfited the antagonism of the local doctor by a simple illustration from a wart on his own hand.

As a result of his experience and his inclinations Mr. Partridge paid much attention to drawing deeds and wills. The chapters headed "Words, Words, Words", "The Country Justice Supreme" and "Making a Will" make good reading for technical as well as human reasons. In "Making a Will" it is shown that, though less frequently, the country lawyer, as well as the country doctor, may be called out in the middle of the night to a distant death-bed. It is, perhaps, fortunate that he does not have to attend births!

The "Country Justice" illustrates a difference between the American and our system. Apparently the local justice, though usually a layman, may also practise as a lawyer and draw deeds and wills. The amusing story of a will drawn by a justice in which the children were to take different parts of the testator's building might have implications in the modern craze for flats! After all, the lay draftsman is not unknown in this country and his handiwork is often not without profit to the profession.

But through all there is the undercurrent that the law and life of the country community cannot be distinguished. "Law in the city is as distant from the individual as the stars. . . . The situation is quite different in the country. There the law is a real and living entity. Find me a countryman who has never seen a lawsuit and I will show you a blind man. Outside the city the common man regards the law very much as he regards the Army and Navy. It is a medium through which he can protect his rights and redress his wrongs. Who ever heard a city man threaten to 'have the law' on anybody? He may threaten to call a policeman or to sock you on the jaw, but he would not

have the slightest idea how to go about it if he wanted to get legal redress. On the other hand, the machinery of the law is as familiar to the countryman as the machinery for cutting hay."

It may be that in the United States the countryman is rather more litigious than in England. Nevertheless this statement is not very wide of the mark as applied to this country. Nor perhaps is the following: "In the country a man goes to his lawyer as freely as he goes to his doctor. He has property rights and personal rights in which he takes a personal pride, and he does not propose to have them trampled upon."

Doctor, parson and lawyer, this trio hold the secrets and the lives of their fellows and upon their wisdom and integrity depend to a large degree the sanity and welfare of their little community. Some wise words appear in the chapter on Gossip and Slander, and our country lawyer said that gossip was the boon and bane of the country lawyer's existence. "'Is that just an ordinary lie or is it a true lie?' I heard my father ask a man who had brought him an item about a lie that was going around." And our market town buzzes with rumour like the noise of bees, sometimes fruitful, sometimes harmless but at others angry and destructive. So Johnny Wright's position was undermined by the talk occasioned by his innocent but painful participation in a brawl at the local inn. On the discretion and acumen of the country lawyer the reputations and happiness of members of his community may depend. Even an alibi in a criminal case may involve the domestic peace of families. The lawyer's standing and integrity may prevent the disclosure of facts which would otherwise be injurious, as might have been the case with the Wilson family.

Let the writer say that he is not and never has been a country lawyer, though he is, through his country friends, intimate with their position and practice. The country lawyer walks abroad and in his own district knows and is known by all. Outside it he may be a figure of little account but in his home town much depends upon him. From the smoky city the town lawyer may regard his country colleague tilling the richer fields of varied human interests. The biography of our country lawyer in its relation to the fashionable biographies of famous lawyers bears a comparison with the humble lay of Gray's Elegy and an elegiac on a great statesman or war lord. Both lawyer and layman would benefit by other such biographies. It is a vast field of human experience and the prestige of the law and lawyers would flourish.

NOTES OF RECENT CASES.

1. *CONVEYANCING AND REAL PROPERTY CASES.*

Positive covenants—burden not running with the land—registered land.—Two cases, *Cator* v. *Newton and Bates*, [1939] 4 All E. R. 457, and *Re Fitzherbert-Brockhole's Agreement*, [1940] Ch. 51, contain assumptions that the burden of a positive covenant does not run with freehold interests in land. In *Re Fitzherbert-Brockhole's Agreement* (*supra*) this statement is clearly made by Bennett, J., but it is expressed as a concession by both parties. In *Cator* v. *Newton* (*supra*) the assumption by the Court of Appeal is implicit. The importance of these cases lies in the fact that though this assumption was generally made in the text-books it was very difficult to find any express authority for the view. *Dicta* there were in sufficient profusion, but the point does not seem to have arisen directly. It might well be argued that in the classic cases on covenant contained in Coke on Littleton there is no such suggestion, and it may well be that Coke would at least have been surprised if such a view had been expressed. This may be due to the decline in the conception of tenurial rights in freeholds. Although the question does not appear to have been argued it is thought that the two cases noted set the hall-mark on the doctrine that positive covenants do not run with the land as regards freehold interests. The benefit does run with the land (see *Forster* v. *Elvett Colliery Co.*, [1908] 1 K. B. 629, at p. 635), and it is thought that on this point no question equally can arise provided that the covenant is entered into with the freehold owner for the benefit of the land.

Cator v. *Newton* (*supra*) was concerned with a transfer of registered land, and it was argued that the effect of section 20 of the Land Registration Act, 1925, was to impose a liability on the transferee to indemnify the transferor for breach of a covenant entered into by the transferor. The transferor had covenanted to bear the expense of maintaining roads, paths, etc., in the conveyance to him in respect of which he was subsequently registered as proprietor with an absolute title. A note of the covenant had been entered on the register, but in the transfer no covenant for indemnity was expressly included. It was argued that the covenant was within the expression "incumbrances and other entries, if any, on the register" to which a transfer is made subject

by section 20 (1). The Court of Appeal rejected this contention. The judgment appears to depend on the fact that there was nothing in the entry to throw the burden of indemnity upon the transferee. It must not be presumed that an entry will never bind the transferee because it concerns a right which would not be binding on a purchaser of unregistered land.

It is to be noticed that the problem arose from the failure to take an express indemnity in the registered transfer. There is a danger of this occurring not only with positive covenants but also, for example, in connection with restrictive covenants. This is due to the fact that the prescribed form, and the printed copies commonly used as drafts, make no reference to these additional requirements. As much care is really required in drafting a registered transfer as an unregistered conveyance. The very absence of a number of the familiar landmarks, such as recitals and habendum, make this duty of care even more onerous where the practitioner is not accustomed to the form.

The case, however, raises another problem. A positive covenant, as such, does not necessarily appear on the Register. The transferor's solicitor must satisfy himself before approving a draft transfer that there are no such personal liabilities to which the transferor is liable. This should be done before contract in order that an appropriate clause should be inserted in the contract itself. If he has no copy of the registered transfer to the registered proprietor and after consulting his client he remains in doubt the solicitor can always see the registered transfer by a personal search at the Registry.

Hire-purchase—consideration of agreement less than £50.—Menzies v. *United Motor, etc., Ltd.*, [1940] 1 All E. R. 540, is a very important decision on hire-purchase agreements. A hire-purchase agreement, of which the consideration in connection with motor cars is less than £50, is subject to certain statutory requirements to be valid. In this case the plaintiff on purchase of a car had wished to get part of the purchase price on loan. She had paid the dealer £25 and the finance company had advanced £37 repayable by monthly instalments. On failure to keep up the instalments the car was taken. The plaintiff objected on the ground that this was contrary to the Hire-Purchase Act, 1938. The question really turned upon whether the £25 paid to the dealer and referred to in the agreement as the first payment could be added to the £37 to bring the total above £50. As was pointed out, the practice of arranging these sales with the aid of finance companies was modern. The dealer received in fact his cash for the whole sale from the

finance company. In this case, however, the payment of £25 had been made in fact to the dealer and the Court declined to treat it as a notional payment to the finance company. Hence the total transaction with the finance company was limited to £37 and the agreement fell within the provisions of the Act.

Mortgage—covenant to insure against damage from the air—impossibility of performing covenant—forfeiture—taking step for enforcement of security—Courts (Emergency Powers) Act, 1939.—Moorgate Estates, Ltd. v. *Trower and Barstow*, [1940] 1 All E. R. 195 (Ch. D.). The plaintiffs, registered proprietors of valuable property in the City of London, in March, 1936, mortgaged it to the defendants by a deed containing a covenant "to keep the said buildings and all property then or for the time being comprised in or subject to the security . . . insured . . . against loss or damage by missiles or projectiles from or fired at aircraft to the full value thereof in the Atlas Assurance Company Limited . . . and that in default (by the plaintiffs) in keeping the said premises insured as aforesaid the (defendants) may insure . . . at the (plaintiffs') expense". In pursuance of the covenant an adjustment in the scope and amount of the existing insurance was made to the apparent satisfaction of the mortgagees' solicitors, though in fact the insurance did not cover the risks specified in the above covenant. At the time of this adjustment of insurance it was possible to insure against the risk of damage from the air as a result of war, but such insurance became impossible in September, 1936. In January, 1939, defendants called in the mortgage money for breach of covenant to insure, and the plaintiffs claimed a declaration that the mortgagees were not entitled to give, nor they bound to comply with, the notice to pay off the mortgage. The defendants joined issue on the claim, and counterclaimed for the usual relief. The plaintiffs' claim was supported by two arguments. They contended, in the first place, that the discharge of their obligation to perform the covenant by subsequent impossibility of such performance was an implied term of the contract. On this point Mr. Justice Farwell (*a*) decided against them on three grounds, only the second of which is open to question. He said, first, that if the parties had intended to provide for the effect of impossibility of performance they could and should have done so expressly; secondly, that though such insurance was possible at the date of the creation of the mortgage, it had not been made; and finally, the dangerous situation of the property and the large

(*a*) At pp. 202, 203.

sum advanced made full insurance under the covenant most desirable.

On the second of these reasons it is suggested that, even had the mortgagors insured in accordance with the covenant, they could not have continued to do so after the renewal date of the policy, as no insurance company would continue a policy unless the so-called "war risks" were excepted. Therefore, the mortgagees, at the date of this action, would still have been entitled to exercise their powers by virtue of a breach of the covenant to insure. In such circumstances, moreover, it is difficult to see any moral difference between a covenant to do something impossible at the time of making the covenant, and one whose performance a short time afterwards becomes impossible.

Even the legal difference is doubtful (*b*). In *Clifford* v. *Watts* (*c*) Mr. Justice Willes remarked: "Cases may be conceived in which a man may undertake to do that which turns out to be impossible, and yet he may still be bound by his agreement," and Pollock (*b*) seems inclined to agree. This point is very material to conveyancers advising on mortgages made after September, 1936, and containing a covenant similar to the one in question. The contractual defence of mutual mistake as to the existence of a state of facts should not be overlooked.

The plaintiffs' second barrel discharged an argument which also missed its mark. They claimed that the defendants' acceptance for a considerable period of the limited insurance constituted an implied waiver of their rights under the covenant. The learned Judge held that there was no such waiver, as both sides appeared, until January, 1939, to be under a mistake of fact as to the extent of the revised insurance; and he could see no ground for the suggestion that "even if the defendants were willing to permit the policy in that form to remain in that form for a year, or for two years, there is any sort of waiver whatever so long as the policy remained on foot and they waived their right to a strict performance of the covenant, and, indeed, if there was any such waiver, it was something which was supported by no consideration whatever, and clearly any such waiver as that could not be enforced against the defendants in all the circumstances" (*d*). A further reason inclining the learned Judge to decide in favour of the defendants was the *possibility* (as to which there was no evidence) of the principal being trust money, in which case a wide covenant would be particularly desirable for the protection of the security.

(*b*) Pollock, Contract (10th ed.), p. 285; cf. Chitty on Contracts (19th ed.), p. 142.

(*c*) (1870), L. R. 5 C. P. 577, at p. 585. (*d*) At p. 203.

The plaintiffs contested the defendants' counterclaim for relief as constituting the taking of a step for the enforcement of a security without having obtained leave of the Court under the Courts (Emergency Powers) Act, 1939, s. 1 (2). As the counterclaim had been lodged and set down for trial before the Act came into effect, Mr. Justice Farwell held that the Act did not apply to the actual hearing of the matter. The decision on this point is of merely temporary importance.

Although the covenant in the mortgage nowhere refers to insurance against "war risks", the preliminary correspondence between the parties and all proceedings at the hearing treated the covenant as applying only to such risks. Such an interpretation is somewhat narrow. In September, 1939, insurance companies refused new insurance against "war risks", not against damage caused by missiles dropped from aircraft outside the scope of that glib phrase.

R. H. G.

War legislation — contract for sale of land — leave to forfeit deposit on purchaser's failure to complete — Courts (Emergency Powers) Act, 1939, s. 1.—Re Griffiths. Re Davies' Contract, [1940] 1 All E. R. 528 (C. A.). This decision of the Court of Appeal did little more than affirm the principle of the Courts (Emergency Powers) Act, 1939, s. 1 (4), by virtue of which a person liable to satisfy a judgment or order or perform an obligation who is presently unable to do so "*by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged*" may be granted relief.

As the defendant failed to complete on the date for completion, October 25, 1939, the plaintiff issued a summons for leave to forfeit the deposit and to retake possession of the property, giving the defendant notice of her rights under the Act. Against the grant of such leave the defendant appealed. The Court of Appeal emphasised that relief could only be granted if the defendant's inability to complete arose from the circumstance of war conditions; and the onus of such proof lay on her. As the defendant would not have been able to complete, war or no war, at the due date, the Court refused relief, following in principle *A* v. *B*, [1940] 1 K. B. 217, and *Tomley* v. *Gower and McAdam*, [1939] 4 All E. R. 460.

R. H. G.

Contract to build — specific performance — whether defendant need have possession of land under the contract. — Carpenters

Estates, Ltd. v. *Davies*, [1940] 1 All E. R. 13 (Ch. D.). This was a claim for specific performance of a building contract. The importance of the decision lies in its attempt to extend the scope of the third condition laid down by Romer, L.J., in *Wolverhampton Corporation* v. *Emmons* (*a*) for the specific enforcement of such a contract.

The plaintiffs, a firm of builders, agreed with the defendant for the purchase of a plot of her land for estate development, the agreement being carried into effect by a conveyance which contained a covenant by the vendor to construct a road and back lane and lay drains, sewers, water, gas and electric mains, all to the satisfaction of the local authority, within three months of the transfer. The defendant substantially performed her obligation under the covenant so far as the road and back lane were concerned, so that building could have proceeded; but, in spite of a series of requests by the plaintiffs, she took no step to construct the drains and main supplies. Thus, the local authority would not have issued a certificate of habitable condition of any building erected, and at the time of this action for that reason the plaintiffs had not commenced building.

Mr. Justice Farwell, after stating the general proposition that a decree for the specific performance of a contract to build is not a usual remedy, considered the unanimous decision of the Court of Appeal in *Wolverhampton Corporation* v. *Emmons* (*b*) creating an exception where (1) the building work is defined by the contract; (2) the plaintiff has a substantial interest in the performance of the contract, for breach of which damages would be an inadequate remedy; (3) "The third is that the defendant has by the contract obtained possession of land on which the work is contracted to be done" (*c*). Only the first two of these conditions were satisfied in the present case; and since the learned Judge foresaw very great difficulty in the way of assessing the damage suffered in terms of money, and was, as a Chancery Judge, naturally unwilling that the plaintiffs should be without a remedy for a clear injury to their legal rights, he proceeded to examine the scope of the third condition. On this, he observed (*d*): "I would rather say that what the plaintiff has to establish is that the defendant is in possession of the land on which the work is contracted to be done," *i.e.*, whether he is in possession under the terms of the contract or otherwise; and he added (*e*): "The mere fact that the defendant

(*a*) [1901] 1 K. B. 515; 70 L. J. K. B. 429.
(*b*) *Supra*, note (*a*). The Court consisted of Sir. A. L. Smith, M.R., Collins, L.J., and Romer, L.J.
(*c*) *Per* Romer, L.J., at p. 525.
(*d*) [1940] 1 All E. R., at p. 17. (*e*) *Id.*, p. 18.

has not got possession of land on which the work is contracted to be done is not necessarily a complete bar to the Court's granting specific performance." The learned Judge was prepared to extend Lord Justice Romer's third condition to cases in which the land on which building was agreed to be done was the defendant's land, retained throughout in her possession, so that the defendant was not in possession of land *under the contract*, but independently of it (*e*). The decree of specific performance, and nominal damages, were granted.

As Mr. Justice Farwell insisted on the fulfilment of the other two conditions, his extension of the third to cases such as the present will be received with satisfaction. His judgment, of course, attempts to modify a Court of Appeal decision. But the modification takes the form of an extension of a statement which the learned Judge could not accept as " completely exhaustive ", a statement forty years old; and the profession will doubtless accept the fairness and logic of this progressive judicial interpretation of precedent.

R. H. G.

Settled land—" small dwellings "—cost of building block of flats borne by capital money.—Re Paddington Estate, [1940] 1 Ch. 43. The interest of this decision of Mr. Justice Bennett lies in its inclusion within the definition of " small dwellings " for the purpose of paragraph (xxii) of Part I of the Third Schedule to the Settled Land Act, 1925, of residential flats comprised in a large block of flats built for occupation by workmen and their families.

Such a block of flats, consisting of units of from two to five rooms, each unit intended to be separately occupied by a family, had been built on a large settled estate of some six hundred acres in Paddington, London. Trustees took out an originating summons to ascertain whether the cost of the building should or should not be borne by capital money under section 73 (1) (iii) and paragraph (xxii), Part I, Third Schedule of the Settled Land Act, 1925, which together authorise the application of capital money towards " the provision of small dwellings, either by means of building new buildings or by means of the reconstruction, enlargement, or improvement of existing buildings, if that provision of small dwellings is, in the opinion of the Court, not injurious to the settled land or is agreed to by the tenant for life and the trustees of the settlement ". This provision replaces section 74 (1) (b) of the Housing of the Working Classes Act, 1890, which allowed capital money to be spent on building " any dwellings available for the working classes, the building of which, in the opinion of the Court, is not injurious to the estate ".

Two questions were thus presented. To the first, "Were the flats in question 'small dwellings'?" Mr. Justice Bennett referred to the unhelpful definition in section 117 (1) (xxv) of the Settled Land Act, 1925 ("'Small dwellings' mean dwelling-houses of a rateable value not exceeding one hundred pounds per annum"), and remarked (p. 45): "Having regard, as I think one is entitled to do, to the modern habits of the working classes, I feel, myself, no doubt that each flat is a small dwelling within the meaning of the definition." An important element in a decision on this point is whether the dwellings are separately assessable for municipal rates, as in this case they were.

To the second question, "Are these improvements injurious to the estate?" the learned Judge found that the erection of a block of residential flats on a large estate comprising both rich and poor was a decided benefit to both classes of the residential community: to the poor perhaps because they could enjoy sun-trap windows and a social club while their children were being safely cared for in the communal crèche; to the rich because the building of an imposing block of flats indirectly increased the value of their own residences.

R. H. G.

Trustee's power of advancement to object of discretionary trust —whether consent of other objects required—Trustee Act, 1925, s. 32.—Re Beckett's Settlement, Eden v. *von Stutterheim* (1940), 56 T. L. R. 342. It may surprise conveyancers to learn that the objects of a discretionary trust are not persons "entitled to any prior life or other interest, whether vested or contingent", in the money advanced by trustees of a settlement under section 32 of the Trustee Act, 1925, so far as the consent of such persons is a prerequisite to any advance by trustees.

Such, however, was the decision of Mr. Justice Simonds in *Re Beckett's Settlement*. Under a settlement made in 1926 by G. B. upon his daughter, now Baroness von Stutterheim, and her three infant daughters, a discretionary trust had, at the time of the trustees' taking out this summons, arisen in relation to all the objects of the trust. The trustees' absolute discretion was to end on the death of Baroness von S., and they were thereafter to hold in trust for her children as she should appoint, and in default of appointment equally between them if they should attain twenty-one or, being daughters, marry under that age. The settlement contained no power of advancement.

The eldest daughter of Baroness von S., still an infant, was about to marry, and the trustees desired to make an advancement to her

under their statutory power for the purpose of a marriage settlement. The Court was asked whether section 32 (1) (c) of the Trustee Act, 1925, necessitated the prior consents of the other objects of the discretionary trust to this advancement. The subsection reads: "Provided that (c) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of full age and consents in writing to such payment or application."

Mr. Justice Simonds recognised that, for some purposes at least, the objects of a discretionary trust had an interest in the trust fund. Thus, he referred to *Re Smith*, [1928] 1 Ch. 915, holding that such objects, if all of full age and together entitled to the trust fund, could put an end to the trust; and to *Att.-Gen.* v. *Farrell*, [1931] 1 K. B. 81, where it was held that for the purposes of the Finance Act, 1894, a settlor had an interest in property settled by him on discretionary trusts if he was one of the objects. But he based his decision on a construction of the statute "according to the ordinary language of conveyancing". "One can only base one's view on experience of conveyancing practice", remarked Mr. Justice Simonds, "and, in my view, although, indeed, the object of a discretionary trust has an interest in equity in the trust fund, yet he would not be appropriately described as a person entitled to an interest, vested or contingent".

One purpose of section 32 of the Trustee Act, 1925, is to confer rights on persons whose interests may not be vested, but only contingent. The power of advancement is in favour of "any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event . . ." (section 32 (1)). In *Re Beckett* the person to whom the advance was to be made and the persons whose prior consent was considered unnecessary were all objects of the same dicretionary trust. So far as concerned the three infant beneficiaries, none of them had a vested interest, as they were all under twenty-one and unmarried, leaving an essential condition of vesting unfulfilled. Moreover, the ascertainment of the *quantum* of the interest to vest had not taken place, so that it may safely be said that none of the infant beneficiaries had a vested interest in the trust fund. Yet one had an interest sufficient to support an advance up to "one half of the presumptive or vested share or interest of that person in the trust property" (section 32 (1) (a)), while the others had no sufficient interest *under the same section of the same Act* to support a self-protective right conferred by sub-section (c).

Although this point does not appear from the reports to have been considered, it seems not entirely irrelevant to the issue. The decision can be supported by more satisfactory reasoning on the ground that under the Trustee Act, 1925, s. 32 (1) (c) only the consents are required of persons entitled to interests *prior* to that of the person to whom the advance is made, whereas in this case all the interests under a discretionary trust arose simultaneously. This point was not taken at the trial. **R. H. G.**

Natural rights—riparian owners—diversion of stream causing damage — statutory powers — test of reasonable execution.—Provender Millers (Winchester), Ltd. v. *Southampton County Council*, [1940] 1 Ch. 131 (C. A.). By virtue of statutory duties and powers under various Acts between 1803 (the Bridges Act, ss. 1 and 2) and 1929 (Local Government Act, s. 29 (1) and (4)), the Southampton County Council was the authority responsible for maintenance and repair of highways and bridges and prevention of flooding in its area. In purported exercise of these powers the Council built a new culvert in a stream to support a highway crossing it, and substituted for the natural bed of the stream one of concrete. The Council also changed the course of one branch of the stream, so that instead of joining the other branch above the culvert, it joined it some distance below. No notice of these alterations was served on riparian owners. The possible effect on their user of the stream had been overlooked. The plaintiffs, owners of Wharf Mill, relied on the water-power of the stream, and the defendants' interruption of its natural flow left insufficient water to work the mill. Plaintiffs brought action for an injunction.

Mr. Justice Farwell held that a riparian owner was entitled to an injunction without showing damage if he could show that his rights had been prejudiced. Purely in their capacity of riparian owners, the Council had no defence, as they had altered the bed of a natural stream. Whether their statutory duty exonerated them from the damage caused afforded Mr. Justice Farwell an opportunity of comparing two *dicta*, the first of Lord Dunedin in *Manchester Corporation* v. *Farnworth*, [1930] A. C. 171, 183, to the effect that, when Parliament authorised a thing to be done in a certain place, no action in nuisance would lie for its commission if such nuisance was an inevitable consequence, but that the onus of showing that the nuisance was inevitable was on the statutory authority. Farwell, J., followed this *dictum* in holding that performance of a statutory duty did not authorise damage to other persons unless there were no other way of doing the work; that

the onus of showing that negative fact was on the Council; and that, as the Council had failed to establish the fact, a mandatory injunction should be granted. With the *dictum* in *Farnworth's Case* the learned Judge considered a statement (*a*) by Lord Macnaughten in *East Fremantle Corporation* v. *Annois*, [1902] A. C. 213, 217. The two *dicta* are not inconsistent when examined in the light of the decisions in which they were given. As Lord Justice Clauson pointed out in the hearing of this case on appeal (*b*), Lord Macnaughten was dealing with a case not involving consideration of the *dictum* in *Manchester Corporation* v. *Farnworth*.

The Court of Appeal upheld Mr. Justice Farwell's decision. Sir Wilfrid Greene, M.R., presiding, prefaced his judgment with the remark that in the present case there was no difference in law whether the stream was natural or artificial. To the argument that the appellants had merely done what they were entitled as riparian owners to do to prevent flooding, the Master of the Rolls replied that they had gone far beyond merely preventing flooding, and there was no evidence that their deprivation of another riparian owner of his rights was essential for the execution of their own purpose. "True it is", asserted the Master of the Rolls, "that the building of walls and embankments may be legitimate in protecting land against floods even if the effect of building them is to throw flood water on to your neighbour's land; but the one thing which the authorities appear to make quite clear is that in carrying out works of protection it is not legitimate to alter the alveus of the stream" (*c*). Dealing next with the question of performance of statutory duty, the learned Judge held that, while the Council were acting properly in maintaining the highway and preventing flooding, they had exceeded their powers in changing the course of the stream unless that method were the only reasonable one (*d*) by which flooding could be prevented, a point on which the evidence was entirely inadequate. R. H. G.

(*a*) "If persons in the position of the appellants, acting in the execution of a public trust, and for the public benefit, do an act which they are authorised by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute."

(*b*) [1940] 1 Ch. 131, at p. 150.

(*c*) [1940] 1 Ch. 131, at p. 145.

(*d*) "If the statutory duty could only have been performed (and when I say that I mean from a reasonable point of view and without calling in the aid of extravagant devices or anything of that kind) by going to that excess, the appellants would have been under no liability, because then they could truly have said that what they had done was the only reasonable thing that they could have done in the performance of their duty": *Per* Greene, M.R., at pp. 147–8.

Natural rights—damage by tree roots—nuisance.—Butler v. *Standard Telephones and Cables, Ltd.*, [1940] 1 All E. R. 121 (K. B.). So far as the writer is aware, this is the first reported English decision on damage caused by tree roots spreading to neighbouring land. Ireland produced such a case in 1913 (*Middleton* v. *Humphries*, 47 Ir. L. T. 160), in which damages and an injunction were granted for the collapse of a wall caused by tree roots.

Butler owned a house near to the defendants' sports ground. In 1930 the defendants planted a row of poplar trees on their land at a distance of ten to thirteen feet from the plaintiff's house. The trees, spreading their roots widely near the surface, drew away the moisture from the clay soil on which the house was built, causing a dangerous settlement of the house. In 1934, when the building was underpinned, roots of the trees were found. The plaintiff brought action for damages for nuisance, negligence and trespass, and for an injunction.

Mr. Justice Lewis, approving a *dictum* of Lord Justice Kay in *Lemmon* v. *Webb*, [1895] A. C. 1, at p. 24, held that the encroachment of the roots was not a trespass, but a nuisance. No prescriptive claim could, therefore, be founded on it, and the plaintiff was entitled to all appropriate remedies, including that of cutting the roots after notice to the defendants. The defendants argued that the planting of trees was a natural right of user of land, and that they were therefore not liable for damage caused by such user. But the right of natural user is not absolute. *Sic utere tuo ut alienum non lædas* is in English law a maxim of limited application; but it seems to apply where, for instance, trees are planted in such a position that their roots or branches will spread to a neighbour's land, and by their nature do damage. The Court granted damages and an injunction. With this decision should be compared *Rouse* v. *Gravelworks, Ltd.*, 1 All E. R. 26 (C. A.), noted below. R. H. G.

Natural rights—lateral support of land—combination of act of defendants and natural causes.—Rouse v. *Gravelworks, Ltd.*, 1 All E. R. 26; 56 T. L. R. 225 (C. A.). The parties were neighbouring landowners, the plaintiff a farmer, the defendants gravel merchants. The defendants excavated gravel on their land almost to the boundary of the plaintiff's land, but the excavation left sufficient lateral support to the farm land. The pit formed by the removal of the gravel filled with water, the effect of which, lashed by the wind against the plaintiff's land, was to cause an

erosion. The plaintiff brought action for wrongful removal of gravel, deprivation of lateral support, and trespass. Mr. Justice Cassels gave judgment for him, and the defendants successfully appealed.

The whole Court of Appeal (Slesser, MacKinnon and Goddard, L.JJ.) upheld the defendants' natural right to dig minerals in their land, and if they did so without infringing the plaintiff's right to lateral support, no wrong had been committed. The defendants were not liable for the subsequent acts of nature in filling their excavation with water and causing erosion of the plaintiff's land. The situation was not governed by *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330, though a *dictum* of Lord Cairns was cited with approval. The action, if any, would not lie in trespass, but on the case.

The difficulty of reconciling this decision with *Butler* v. *Standard Telephones and Cables, Ltd.*, [1940] 1 All E. R. 121 (noted above) is very great. In both a landowner exercises natural rights : in one he digs gravel, in the other sets trees; in one natural causes result in the formation of a lake, in the other in the spreading of roots; in one he is not liable for damage to his neighbour, in the other he is. Though the principles (if they are worthy of the name) of remoteness of damage are irrelevant where the original act is not wrongful, an inverse process might be employed in a clear case of this kind to make a landowner liable for exercising a natural right when the natural and known consequence of such exercise is damage to neighbouring land. A right is not absolute just because it is natural. The right of mining is subject to the surface owner's or adjoining owner's right of support, vertical (*Backhouse* v. *Bonomi* (1861), 9 H. L. C. 503), or lateral (*Trinidad Asphalt Co.* v. *Ambard*, [1899] A. C. 594). And if that support is *in fact* removed by the defendant's act which starts a course of natural and probable consequences, namely, the formation of a lake, the defendant should be liable for any damage thereby occasioned. For, nature being impartial, the right of support prevails over the right of taking minerals.

Another line of reasoning is suggested by the case of *Hurdman* v. *North Eastern Ry.* (1878), 3 C. P. D. 168, in which the defendants were held liable for raising the level of their land by piling soil, clay and refuse upon it, so that water percolating to the lower level of the plaintiff's land made his house damp. Lord Justice Cotton treated the pile as an artificial erection and, on the maxim "*sic utere tuo ut alienum non lædas*", affirmed the judgment in the plaintiff's favour. Two interesting points of comparison with *Rouse's Case* arise. First, a removal of soil is as much an inter-

ference with the natural state of land as piling soil upon it; just as if Gravelworks, Ltd., had made a pile at the side of the pit of the gravel they had dug and intended to cart away. Secondly, in both cases it is not the act itself of the defendants which immediately caused the damage, but the operation of natural forces upon it. In *Hurdman's Case* the plaintiff's objection was not to the pile of soil on the defendants' land, but to the percolating rainwater which fell upon it. The Court distinguished *Hurdman's Case* from the one before it on the ground that the former involved an artificial erection, the latter did not. The possibility of an artificial excavation was not considered. Whether a landowner sinks a mine in his land or builds a house upon it, he has made a non-natural alteration to it, *i.e.*, an alteration not caused by substantially natural forces; and it is misleadingly false to assume that an alteration made to land by virtue of a natural right in the land is thereby a natural alteration. R. H. G.

Option to purchase granted by will—apportionment of dividends of shares—Re Wimbush, Richards v. *Wimbush and Others*, [1940] 1 All E. R. 229.—Where a *legacy* of shares has been given, the Apportionment Act, 1870, applies to any dividends declared after assent in respect of the periods before and after the testator's death: *Bates* v. *Mackinley* (1862), 31 Beav. 280; *Re Edwards*, [1918] 1 Ch. 142. But the Act does not apply to a *sale* of shares where a dividend is declared shortly after the transfer: *Black* v. *Homersham* (1878), 4 Ex. D. 24. In *Re Wimbush* (above) a testator directed his executors to allow his son to purchase various blocks of shares forming part of the testator's estate, the options to be exercised within various specified times from the testator's death. The will fixed maximum prices for the shares.

Morton, J., dealing with all the transactions involved on the same basis, decided that the son exercising the option must be treated as a purchaser buying the shares either "*cum div.*" or "*ex div.*", not as a legatee, despite the price limit fixed by the testator, the effect of which was to make the shares a bargain at the price asked. The learned Judge held that a dividend declared in April, 1936, in respect of the year 1935 belonged wholly to the son, despite the fact that he only bought the shares in September, 1935. "The purchaser," remarked Morton, J., "bought the tree, and, with it, the fruits which are ripening on the tree" (p. 233). So purchasers of shares, even by means of options conferred by will, are still spared the judgment of Solomon.

R. H. G.

Mortgage to building society—collateral security—fraudulent misrepresentation—Bradford Third Equitable Benefit Building Society v. *Borders*, [1940] 1 Ch. 257; 1 All E. R. 302 (C. A.).—The facts of this case are too familiar to need extensive exposition. The defendant purchased a house from a firm of builders for £730, relying upon a brochure issued by the vendors with the concurrence of the plaintiffs, to the effect that the house was so well constructed that the plaintiffs were prepared to lend up to 95 per cent. of the purchase price on mortgage. A loan of this proportion was made, chiefly on the security of the house, but partly on the collateral security of a fund deposited by the builders to safeguard the plaintiffs against loss in respect of the advance in excess of their normal limit. On this point the Court of Appeal held that, though the mortgage on the collateral security might be unauthorised by the Building Societies Acts, 1874 and 1894, it remained enforceable provided the freehold house was more than nominal security. The rules of the plaintiff society, which were broken by this advance, were "mere internal regulations, possibly enforceable by the society against its directors, but not having the effect of rendering a transaction which does not comply with them invalid as between the society and those dealing with it, as being outside the scope or the objects of the society" (*per* Clauson, L.J., [1940] 1 All E. R. 308). The judgment on this point followed *Halifax Building Society* v. *Salisbury*, [1939] 4 All E. R. 427, and affirmed the decision of Bennett, J., in the lower Court. The matter is now largely covered by the Building Societies Act, 1939, which validates advances made on the most usual forms of collateral security, being pure personalty, provided the substantial security is land.

The Court of Appeal, reversing the second part of the judgment of Bennett, J., held that the plaintiffs had, through their agent, made themselves responsible for the statements contained in the brochure which induced the purchase of the house, and were, therefore, liable in fraud. As the builders had not been joined in the action, the defendant had not counterclaimed for rescission of the contract and mortgage. She would obviously derive greater satisfaction from a judgment of damages for fraud. The judgment of the Court of Appeal ordered inquiries as to the true value of the house when purchased, the measure of damages (subject to allowances both ways) being the difference between that value and the price actually paid.

The fact that the plaintiffs' surveyors inspected the defendant's house and certified it to be worth £730, the exact figure of the purchase price, is probably more than a coincidence. In the

writer's experience the certification of value at the exact purchase price is often almost automatic in mortgages of newly-built houses, and could raise a justifiable suspicion in the minds of thinking purchasers that some arrangement for collateral security existed between their vendor and mortgagee. But the more usual effect of such valuation is to convince the purchaser that he has expert authority for believing his house worth the price he has paid for it.

R. H. G.

---

2. *LANDLORD AND TENANT CASES.*

By Lionel A. Blundell, LL.M., Barrister-at-Law.

Liability of landlord for nuisance to adjoining owner.—The case of *Wringe* v. *Cohen*, [1940] 1 K. B. 229, will be discussed at length in a separate article in the next issue of *The Conveyancer*.

Covenant by lessors not to permit use of neighbouring premises for the purpose of the business of the sale of tobacco, cigars and cigarettes—whether sale of cigarettes in tea-shop a breach.—Where neighbouring shops are let by the same lessor it is common to insert in the leases covenants to secure to each lessee freedom from competition in his particular line of business, thus enhancing the rental values of the shops.

In *Lewis & Co. (Westminster), Ltd.* v. *Bell Property Trust, Ltd.* (1940), 56 T. L. R. 391, the lessees, who were tobacconists, had the benefit of a covenant by the lessors that they would not suffer or permit any of certain neighbouring premises to be used for the purposes of the business of the sale of tobacco, cigars and cigarettes, and they claimed that the lessors had broken this covenant by permitting the lessees of one of the shops, who carried on the business of a restaurant and tea-shop, to sell cigarettes. In fact, the cigarettes were sold only at the cashier's desk, in the way not uncommon in tea-shops. Two questions arose : first, was " the business of the sale of tobacco, cigars and cigarettes " being carried on in the tea-shop ? Secondly, if such a business was being carried on, had the lessors " suffered or permitted " the premises so to be used, so that they were liable on the above covenant ? Since Simonds, J., decided in favour of the lessors on the first question, he did not need to come to a final conclusion on the second, although he evidently favoured the view that the lessors could not in the circumstances have said that they had not suffered or permitted the user in question.

The view taken by Simonds, J., was that the incidental sale of

cigarettes as part of the business of a tea-shop was no more a carrying on of the prohibited business than the selling of milk either in glasses or as an ingredient of tea would be carrying on the business of a retailer of milk. The business which was being carried on was no more than the usual business of a tea-shop, which involves the sale of a number of articles therein usually sold. The case of *Stuart* v. *Diplock* (1889), 43 Ch. D. 343, cited in *Woodfall* (24th ed.), at p. 604, provides an interesting analogy and was referred to by the learned Judge.

Of the other cases cited, *Buckle* v. *Fredericks* (1890), 44 Ch. D. 244, and *Fitz* v. *Iles*, [1893] 1 Ch. 77, were both cases where there was definitely an ancillary business carried on of the kind prohibited by the restrictive covenant. In *Buckle* v. *Fredericks* an extension to a theatre was built on land subject to a restriction forbidding the carrying on of the trade of a retailer in wine, spirits or beer and counters were therein placed where persons frequenting the theatre could purchase wine, spirits and beer : it was held that this, though ancillary to the business of a theatrical manager, was a carrying on of the prohibited trade. In *Fitz* v. *Iles*, dealers in tea, coffee and other groceries were prohibited by covenant from using their premises as a coffee-house : it was held that the sale of light refreshments to be consumed on the premises would be carrying on the business of a coffee-house keeper within the meaning of the covenant. In both of these cases the breach consisted of the carrying on of the prohibited business as a distinct, though ancillary, business, whereas in *Stuart* v. *Diplock* and in *Lewis & Co. (Westminster), Ltd.* v. *Bell Property Trust, Ltd.*, what was complained of was really not the carrying on of a distinct business but the doing of something in the course of carrying on a permitted business which happened at the same time to be part of the prohibited business.

Practice under the Landlord and Tenant Act, 1927—new evidence after report of referee.—Where an application under the Landlord and Tenant Act, 1927, has been referred to a referee for report under section 21 of the Act (see *Woodfall*, 24th ed., p. 1083), it is the duty of the Judge upon consideration of the report to admit any further evidence tendered by the parties which may be relevant, since the consideration of the report is not an appeal from the referee but an original hearing of the matter : *British & Argentine Meat Co., Ltd.* v. *Randall* (1940), 162 L. T. 91, citing *Simpson* v. *Charrington & Co.*, [1934] 1 K. B. 64, where Scrutton, L.J., said at p. 76 : "In my opinion, the relation of the county court Judge to the Referee for inquiry and report only

is the same as that of a High Court Judge to such a Referee. A motion to vary the report is necessary if it is to be challenged. On such a motion each Judge is at liberty to adopt, vary, or disregard a finding of the Referee, or to hear fresh evidence on any point." The same case, *British & Argentine Meat Co., Ltd.* v. *Randall*, affords also further light, following *Whiteman Smith Motor Co., Ltd.* v. *Chaplin*, [1934] 2 K. B. 35, upon the mode of determining what goodwill within the meaning of the Act has attached to premises.

---

3. *WILL CASES.*

By S. J. Bailey, LL.M., Barrister-at-Law.

Administration—executor's right of retainer—costs of administration action.—The Court of Appeal, in *Re Wester Wemyss, Tilley* v. *Wester Wemyss*, [1940] 1 Ch. 1, has now (Luxmoore, L.J., dissenting) affirmed the decision of Crossman, J., noted *ante*, vol. 3, p. 349. The Court's discretionary power as to costs ought not to be exercised in such a way as to give priority over an executor's right of retainer to the costs of a creditor's administration action.

Apportionment—tenant for life and remaindermen—death of tenant for life—valuation of investments appropriated towards satisfaction of remainderman's share.—In *Re Firth*, [1938] Ch. 517 (*ante*, vol 2, p. 384 A), Farwell, J., re-affirmed the rule that the personal representatives of a deceased tenant for life of a settled fund have ordinarily no right, if the trustees sell investments "*cum dividend*", to claim from the proceeds of sale a sum representing so much of the dividend as accrued before the death of the life-tenant. In fact in that case some of the investments, instead of being sold when the life-tenant died, had been appropriated and transferred cum dividend to the remaindermen. This latter arrangement was adopted on the death of a life-tenant in *Re Henderson, Public Trustee* v. *Reddie*, [1940] W. N. 91, and a summons was taken out asking whether the personal representatives of the life-tenant should be paid an apportioned part of the income in respect of the broken period immediately prior to his death. Morton, J., held that an appropriation, unlike a sale cum dividend, cannot defeat the claim of the personal representatives; and he stated that he had ascertained from Farwell, J., that his decision in *Re Firth* (*ante*) was directed solely to the case of investments sold. Accordingly, when valuing an investment with a view to its appropriation cum dividend towards a share in remainder in

the trust fund, the trustees should take into account the fact that a due proportion of the dividend for the broken period is payable to the representatives of the deceased tenant for life.

Conflict of laws — intestate succession — British subject with Italian domicil of choice—law of the nationality.—By Italian law, intestate successions are regulated by the national law of the deceased. In *Re O'Keefe, Poingdestre* v. *Sherman,* [1940] 1 Ch. 124, a spinster had died intestate in Italy, having resided there continuously for nearly fifty years, leaving only personal estate. She had never acquired Italian nationality, but it was admitted that she had acquired an Italian domicil of choice.

She was born in India, and it would appear that at the date of her birth her father was a British subject retaining a domicil in Southern Ireland, the place of his birth. Crossman, J., held that her property was distributable under the law of Eire. On applying the law of her domicil at death (Italy), one is required to apply her national law. She was not in fact a citizen of Eire, within the recent legislation of that country. The learned Judge, however, held that her nationality was British; that her domicil of origin was Southern Ireland; and that the only part of the British Empire to which she can be said to have belonged was Southern Ireland—her domicil of origin. He therefore held that her estate was distributable in accordance with the law of Eire, as applicable to a person dying intestate domiciled in Eire.

Legacy—rule against perpetuities—settled legacy—forfeiture clause—whether severable.—Re Morrison's Will Trusts, Walsingham v. *Blathwayt,* [1940] 1 Ch. 102, raises a somewhat difficult point relating to the rule against perpetuities. The testatrix bequeathed to Elizabeth £5,000, and directed that it be held upon trust for Elizabeth for life and thereafter for her children in equal shares. A later clause of the will directed that any legatee who should become or marry a Roman Catholic should forfeit all benefits under the will, and specifically stated that "if such benefit be a life interest the fund out of which such life interest is payable shall fall into my residuary estate and if any such benefit be an absolute interest the same shall also fall into my residuary estate". It will thus be observed that, to this extent, the clause dealt separately with forfeitures due respectively to the acts of Elizabeth and to the acts of her children. Counsel argued that the forfeiture clause was completely void, as infringing the rule against perpetuities; for, inasmuch as it purports to work a forfeiture whenever any child of Elizabeth becomes a Roman Catholic, it is not restricted to

the period of lives in being and twenty-one years. Bennett, J., however, held that the forfeiture clause in the present case was severable : it was therefore good as regards legatees who, if they do the prohibited act, are bound to do it within the perpetuity period. Accordingly, Elizabeth (a life in being) having become a Roman Catholic, he held that the whole of the settled legacy thereby failed by virtue of the forfeiture clause.

The judgment was based upon a quotation from *Re Russell*, [1895] 2 Ch. 698, C. A., where a proviso for the settlement of shares of the residuary estate was held not to infringe the perpetuity rule as regards such residuary legatees who were in being at the testator's death. It was there emphasised (at p. 702) that the proviso was so framed as to apply separately to each of the various shares of residue. In the present case it would seem that the forfeiture clause was similarly regarded as being so framed as to apply separately to every legatee under the will. The fact that the clause dealt separately with the acts of a life tenant on the one hand and those of absolute legatees on the other was not emphasised.

Will—construction—" sisters-in-law "—" brothers-in-law ".— In *Re Richards, Cawley* v. *Dacey*, [1939] W. N. 408, a will concluded with a residuary gift " between my sister in laws and brothers in law equally divided ". At the death of the testatrix it transpired that the possible beneficiaries under this gift included (i) the spouses of brothers and sisters of the testatrix, (ii) brothers and sisters of the husband of the testatrix, and (iii) the spouses of brothers and sisters of the husband of the testatrix. Crossman, J., held that, in their strict and primary meaning the terms " brothers-in-law " and " sisters-in-law " include (i) and (ii), but do not include (iii). This decision was reached after reference to various editions of the Oxford English Dictionary, from which it appeared that these terms properly signify those persons who, though not so in fact, were regarded by the canon law as being one's brothers and sisters and consequently as persons whom one could not lawfully marry. There was nothing in the present will to extend the primary meaning of the terms used. Accordingly, persons falling within class (iii), above, were held to be excluded from the gift.

Will—construction—gift to the children of any child " who shall die in my lifetime "—words of futurity.—A bequest of property upon trust for such members of a class (*e.g.*, the children of the testator) as shall be living at the testator's death is commonly followed by a proviso whereby, in case any potential member of that class

"*shall* die in my lifetime leaving a child or children who shall survive me", the share which he would have taken had he outlived the testator shall pass to his child or children. In *Loring* v. *Thomas* (1861), 1 Dr. & Sm. 497, it was established that the use of words of futurity in such a proviso does not necessarily prevent it from applying for the benefit of the children of some potential member who died before the date of the will. The phrase "shall die" may thus be read as "shall have died", if such a construction is consistent with the apparent intentions of the will. The rule in *Loring* v. *Thomas* is firmly established, and has been followed by the House of Lords in *Barraclough* v. *Cooper* (1905), [1908] 2 Ch. 121 n., and by Eve, J., in *Re Lambert*, [1908] 2 Ch. 117; but it is to be observed that *prima facie* the words "shall die" must be construed as words of futurity. Only when it is evident that they were not used in a strictly grammatical sense importing futurity can the Court depart from their strict grammatical meaning; consequently they cannot be construed to mean "shall have died" unless there is something in the will to support this abnormal construction. In *Loring* v. *Thomas* itself such support was found in the fact that the same clause employed the future tense in referring to events which the testator clearly did not intend to restrict to future events. Accordingly, the decisions which have thus read "shall die" as meaning "shall have died" are usually founded on the presence of a context to the effect that the children to take the share their deceased parent would have taken are those "who being male *shall attain* the age of twenty-one years or being female *shall attain* that age or marry"; for it is unlikely that the testator intended thereby to exclude any children who had already reached twenty-one, etc., before the date of the will. In *Re Birchall, Kennedy* v. *Birchall*, [1940] W. N. 88; [1940] 1 All E. R. 545, a case arose of precisely this type, save that (the headnote in All E. R. notwithstanding) the word "shall" was absent from the provisions of the supporting context. The Court of Appeal, however, held that this did not oust the rule in *Loring* v. *Thomas*; for the phrase "who being male attain the age of twenty-one years" is the exact equivalent of the phrase "who being male shall attain the age of twenty-one years".

---

4. *INCOME TAX CASES.*

By L. J. Stein, Barrister-at-Law.

[The decisions selected for notice are not necessarily those of the greatest importance from the point of view of the income tax

practitioner, but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

Tax-free annuities—annuitant's reliefs and allowances.—In *Re Eves, Midland Bank* v. *Eves*, [1939] Ch. 969, a testator had provided by his will for the payment to his widow of an annuity of £1,000 "to be paid free of all duties and free of income tax at the current rate for the time being deductible at the source by equal quarterly payments". The question which arose was whether the widow was entitled to retain for herself the benefit of any reliefs or allowances claimable by her under the Income Tax Acts without accounting for them, or some part of them, to the trustees. In other words, the question was whether the trustees had an interest in the reliefs and allowances by virtue of the rule in *Re Pettit*, [1922] 2 Ch. 765, or whether *Re Pettit* was distinguishable in the same manner as it was distinguished in *Re Jones*, [1933] Ch. 842, where the annuitant was held to be entitled to retain the full benefit of the reliefs and allowances for herself. In *Re Jones* the annuity was "such an annuity as after deducting income tax at the current rate therefrom will amount to the clear yearly sum of £——". In deciding that the rule in *Re Pettit* did not apply, Eve, J., construing "tax at the current rate" as meaning tax at the standard rate, took the view that what the testator had really provided was not a tax-free annuity properly so called, but an annuity of such amount as would, after deduction of tax, leave a stated sum, the result being that the trustees had no concern with the rate at which tax might be ultimately payable by the annuitant and had no interest in any reliefs or allowances to which she might be entitled. In *Re Eves*, above, there was a reference to "income tax at the current rate", but the annuity was not, as it was in *Re Jones*, expressed to be an annuity of such a sum as would, after deduction of tax at the current rate, leave a stated amount. Morton, J., held that the reference to deduction of tax at the current rate was not sufficient of itself to exclude the application of the rule in *Re Pettit*, the testator's intention having probably been merely to make it clear that the annuity was not free of surtax. Accordingly, he decided against the annuitant's claim to retain for herself the whole benefit of the reliefs and allowances to which she was entitled. A recent decision on a similar point by the Court of Appeal in *Re Maclennan*, [1939] 1 Ch. 750, was discussed in *The Conveyancer* for September, 1939, at p. 105. In *Re Maclennan*, where the document to be construed was a deed of family arrangement entered into, pursuant to an order of the Court, by the beneficiaries of a will, the rule in

Re Pettit was held to be applicable in the case of a covenant to pay an annuity of such amount "as . . . would . . . after deduction of income tax but not surtax leave in [the annuitant's] hands the sum of £500 clear of all deductions for income tax but not surtax".

Annuities—whether tax free—annuitant's reliefs and allowances.—In *Rowan's Trustees* v. *Rowan*, [1940] S. L. T. 34, the trustees of A's will had been directed to pay to his children, X and Y, "the free annual income of the residue" of A's estate. A's brother, B, had also, by a codicil to his will, made provision for X and Y by directing that if the free annual income of the residue of A's estate should fall short of £240, then B's trustees should pay to X and Y "the difference between the amount of the free income they shall actually receive in any year from their father's trustees" and £240. On the construction of the codicil to B's will it was held that, in ascertaining the testator's intentions, full weight must be given to the words "shall actually receive". It was pointed out that the effect of the word "actually" could be illustrated from the Income Tax Act itself; rule 19 of the General Rules provides that a person who deducts tax on paying an annual sum shall be acquitted and discharged of the amount represented by the deduction "as if that sum had been actually paid". The inference to be drawn from the language used by the testator was—it was held—that he intended the income of X and Y to be brought up to £240 free of tax, so that if in any year the net income of the residue of A's estate, after deduction of tax, fell short of £240, B's trustees could be required by X and Y to provide such an amount as would, after deduction of tax, bring X and Y's net income up to £240.

This point having been disposed of, the question arose whether X and Y were or were not entitled to retain for themselves the full benefit of any reliefs and allowances claimable by them under the Income Tax Acts. As mentioned in the preceding note, this is a point which has been recently considered by the English Courts in *Re Maclennan*, [1939] 1 Ch. 750, and *Re Eves*, [1939] 1 Ch. 969. Applying the principles propounded in *Re Maclennan*, the Court of Session took the view that, on the true construction of the language used by the testator, there was nothing to indicate an intention that X and Y's reliefs and allowances should be taken into account. What was really provided was merely that the trustees should, in certain events, pay to X and Y such a sum as would, after deduction of tax, leave a stated amount, the stated amount being quantified, in each case, by reference to the difference

between £240 and the net income of the residue of A's estate. It followed that the case fell within the principle of *Re Jones*, [1933] Ch. 842, and not within that of *Re Pettit*, [1922] 2 Ch. 765.

Annuity—" clear of all deductions ".—In *Re Wells' Will Trusts*, *The Times* newspaper, March 1, 1940, Simonds, J., in dealing with a gift of an annuity " clear of all deductions ", applied the well-established principle that where an annuity has been directed to be paid " free of deductions ", such directions will not suffice to make it payable tax free unless it clearly appears on the face of the document that such was the testator's intention. In *Re Cowlishaw*, [1939] 1 Ch. 654 (see *The Conveyancer*, June, 1939, at p. 444) an annuity directed to be paid " free of all duties . . . free of all deductions whatsoever " was held by Bennett, J., to be payable tax free on the ground that unless the reference to deductions was so interpreted, it would be meaningless and ineffective. In *Re Wells' Will Trusts*, above, Simonds, J., following the main current of authority, held that the annuity was not payable tax free. He distinguished *Re Cowlishaw* on the ground (*inter alia*) that in the case before him the trustee was the Public Trustee, who was entitled to be paid income fees. Though a different rule has since been laid down (see *Re Riddell*, 52 T. L. R. 675), the law as it stood at the time when the will was made was that the Public Trustee's income fees were payable out of an annuity of which he was trustee (see *Re Bentley*, [1914] 2 Ch. 456). The learned Judge pointed out that it might well be the case that these were the deductions which were present to the testator's mind, so that it could not be said, as it was said in *Re Cowlishaw*, that the words " deductions " must be taken to refer to deductions of tax, since they could refer to nothing else.

Mortgagee in possession — redemption action — tax paid by mortgagee on amount representing interest—mortgagee's accounts. —In *Hollis* v. *Wingfield*, [1940] 1 All E. R. 531, the Court of Appeal, affirming the judgment of Farwell, J., [1940] 1 All E. R. 442, decided a tax point of interest to mortgagees in possession. Shares in a company had been mortgaged by X to Y. The company went into liquidation, and out of the proceeds of the sale of the company's assets certain payments were made by the liquidator to Y, who, to the extent of those payments, was in the position of a mortgagee in possession. The tax point arose in proceedings in a redemption action instituted by X. In the accounts required to be taken in the redemption action Y had, in the first

instance, shown the amount due for interest as the net amount after deduction of tax. But to the extent to which the sums received by Y from the liquidator represented interest, Y, not having been taxed by deduction as she would have been if the interest had been paid to her by X, was taxable by direct assessment. She had in fact been assessed on the amount of the interest and had duly paid the tax. She now sought to amend the account so as to give herself credit for the tax so paid, the practical effect of the amendment being the same as though the calculation were made on the footing that the interest fell to be included at its gross amount without deduction of tax. It was held that Y was entitled to pay the tax out of the money in her hands, and that she ought not, in the circumstances, to be held to her original account, in which she had erroneously shown the interest less tax. Leave was given accordingly to amend the account so as to make the necessary adjustment.

Child allowance—payments to divorced wife for maintenance of children.—The decision in *Stevens* v. *Tirard*, 55 T. L. R. 838 (see *The Conveyancer* for September, 1939, p. 108) has now been affirmed by the Court of Appeal (18 A. T. C. 305).

---

5. *DEATH DUTY CASES.*

By L. J. Stein, Barrister-at-Law.

Estate duty—gift of shares within three years of death—subsequent issue of bonus shares.—Section 7 (5) of the Finance Act, 1894, provides that for the purposes of estate duty "the principal value of any property shall be estimated to be the price which . . . such property would fetch if sold in the open market at the time of the death of the deceased". As shown by the discussion in *Strathcona* v. *C. I. R.*, [1929] S. C. 800, the provisions of section 7 (5) may, in some circumstances, present difficulty in their application to cases of gifts *inter vivos* within three years of the donor's death. It is clear that the valuation to be made is a valuation as at the date of the death, but what may not always be equally clear is the identity of the property to be valued. In *Re Payne's Declaration*, [1939] 1 Ch. 865 (see *The Conveyancer*, September, 1939, at p. 111) it was decided that where property had been settled within three years of the settlor's death, the property to be valued as provided in section 7 (5) of the 1894 Act for the purposes of estate duty under section 2 (1) (c)

was the settled property in the form in which it existed at the date of the death. This was on the footing that, notwithstanding any changes of investments, the trust fund must be regarded as having a continuing identity. Another aspect of the problem presented by section 7 (5) in its application to cases in which estate duty is claimable under section 2 (1) (c) in respect of gifts *inter vivos* was recently considered by Wrottesley, J., in *Att.-Gen.* v. *Oldham*, [1940] W. N. 93. In this case it was not a question of a settlement but of an outright gift of shares. After the shares had been transferred to the donee, but before the death of the donor, the company made an issue of bonus shares, of which the donee received her appropriate proportion, with the result that at the donor's death she held 10,000 bonus shares in addition to the 25,000 shares the subject of the gift. The bonus issue was immediately reflected in a fall in the Stock Exchange quotation for the company's shares, and when, a year later, the donor died, the 35,000 shares were worth only slightly more than the 25,000 shares had been worth at the date of the gift. Estate duty under section 2 (1) (c) was claimed at the donor's death on the whole 35,000 shares, but it was held that the bonus shares could not be regarded as property taken under a disposition made by the deceased and that the property to be valued under section 7 (5) must accordingly be limited to the original 25,000 shares.

Cesser of widow's annuity—testator domiciled in Northern Ireland—at annuitant's death estate partly invested in England.—The decision in *Re White, Skinner* v. *Att.-Gen.*, [1938] W. N. 57, 207 (see *The Conveyancer* for March, 1938, pp. 282—283 and for June, 1938, p. 384J) has now been affirmed by the House of Lords (18 A. T. C. 251).

THE LIBRARY.

Practical Hints on Draft Leases (including the Emergency Legislation). By E. O. Walford, LL.D. (Lond.). With an Introduction by His Honour Judge Lawson Campbell. Second edition. The Solicitors' Law Stationery Society, Ltd. xxviii and 224 pp. (15*s.* net.)

I suppose there is no contributor better known to readers of the *Conveyancer* than Dr. Walford. Have we not all learned a great deal from his lucid articles on Conditions of Sale of Land which appeared in Vols. I, II and III, and have not most of us used his precedents which have for many years past appeared in the miscellaneous section of both the old and new *Conveyancers*? This being so, we have learned to

expect something good from Dr. Walford, and this new volume of his will not disappoint any one of us. It is well written and well printed and nearly every point likely to arise in practice is considered; the precedents are good and about forty pages are given up to the Emergency Legislation and its consequent effects on present day practice. The work also contains an excellent introduction by His Honour Judge Lawson Campbell, in which he refers to a solicitor "giving to his expectant client advice which may have some reasonable chance of proving correct"; should not such a client rather be referred to a doctor?

The principal Emergency Acts dealt with are (1) the Landlord and Tenant (War Damage) Act, 1939, (2) Essential Buildings and Plant (Repair of War Damage) Act, 1939, and the Housing (Emergency Powers) Act, 1939, (3) Civil Defence Act, 1939, so far as it is concerned with matters likely to arise between landlord and tenant, and (4) Compensation (Defence) Act, 1939, so far as it is concerned with lands and buildings.

Dr. Walford points out that it is hoped that the book may be of assistance to estate agents; it most certainly will, but Dr. Walford also clearly sets out the statutory provisions which govern the preparation of documents under seal as to who may and who may not prepare such documents.

We have one small criticism to make. Dr. Walford points out that *White* v. *Bijou Mansions, Ltd.*, [1937] Ch. 610 is a direct authority for the proposition that a person taking a lease of registered land is, by virtue of section 50 (2) of the Land Registration Act, 1925, affected with notice of and is bound by restrictive covenants entered on the Register relating to the landlord's title; he quotes the *dictum* of Simonds, J., that once the entry is on the Register it is notice to all the world, but the learned Doctor does not in fact point out how all the world is to get such information; such information is not, in fact, available to all the world as entries on the Register are secret and can only be divulged with the consent of a proprietor; of course, as Dr. Walford does point out on p. 114, an authority should be obtained to search the Register, but how many lessors will be prepared to or can give such authority when they themselves are not the registered freehold proprietors? In these circumstances how is it possible to comply with the Law Society's recommendation quoted on p. 116 that the usual searches required in the case of a purchaser should be made?

We can recommend this book to every conveyancer, whether a member of the Bar, a solicitor, or an estate agent, with every confidence.

DONALD C. L. CREE.

Law Affecting Builders. By the Hon. DOUGALL MESTON, of Lincoln's Inn, Barrister-at-Law, and H. E. PIFFE-PHELPS, Solicitor of the Supreme Court. London: Sweet & Maxwell. 1939. xxxvi and 267 pp. (15*s.*)

THE Preface states that this book is designed primarily for building owners, contractors and sub-contractors, but its utility seems to be wider. It covers not only the obligations and restrictions in respect of the contract to build and sell buildings but also the rules of negligence and nuisance and kindred matters pertaining to building development. The work is

clear and concise, with a reasonable apparatus of authority. It is, from the practitioner's point of view, particularly useful for the adequate statement of all the statutory rights and obligations arising from such matters as the Housing Act, the Town Planning Act, the Ribbon Development Act and the Public Health Act. These are matters which in ordinary conveyancing books receive scant treatment. The information is easily accessible and stated in a practical form. When the shadows of war permit a renewal of building operations this book would be a useful reference work to check a building contract or the plans for building development.

Woodfall's Law of Landlord and Tenant. Twenty-fourth edition. With Supplement of Emergency Legislation. By L. A. BLUNDELL, LL.M., Barrister-at-Law. London: Sweet & Maxwell and Stevens & Sons. 1939. cxlix and 1431 pp. (52*s.* 6*d.*; Supplement 5*s.*)

WOODFALL is so well known that in an ordinary case it would be necessary only to record its appearance. This edition, however, calls for further comment. It represents a policy which can be observed in some other recent editions coming from the same publishers, of modernising certain standard text-books, such as *Lewin on Trusts* and *Clerk and Lindsell on Torts.* It is almost inevitable in a long course of editing that a text-book comes to be encumbered with a certain amount of legal dead wood. Severe pruning is a difficult process which has to be accompanied with the unobtrusive planting of the seeds of a new growth. *Woodfall* was in sore need of this process. The law of landlord and tenant has developed enormously since this book was drastically recast. The learned editor has indeed laboured diligently in his vineyard.

The Property Legislation has at last been adequately incorporated into the framework of the book. This alone has necessitated the recasting and, to a considerable degree, the rewriting of some chapters. A new chapter has been written on covenants generally, drawing together the threads of this highly complex subject. This chapter is symbolic of the work of the learned editor. He has sought to weave the patchwork of the law into a whole, bringing into their right relation the accretions of the years either by case law or statute. In doing this there is obviously the danger of making a work already familiar a little too strange. This has not been done and it is possible that in subsequent editions more work will be necessary completely to modernise the book. Practitioners will be grateful for what has been done and no practitioner who has occasion to deal with this branch of the law should be without this edition. It does more than replace the former edition, it supplants it entirely.

One other feature should be mentioned, namely, the service of supplements to keep the law up to date. This is a cumbersome method which cannot be allowed to supplant new editions, and how cumbersome it is can be seen from the first supplement containing the emergency legislation. This in itself is a small book. It is a good summary but if the supplements are to continue to grow in size the whole will be unmanageable. Nevertheless purchasers of the edition will be grateful for this guide to a very complicated subject of the first practical importance.

Loose-Leaf Emergency Legislation. Edited by JOHN BURKE, Barrister-at-Law. London: Hamish Hamilton (Law Books). (£3.)

THIS volume contains the Emergency Legislation up to date together with the Statutory Rules and Orders connected therewith. The principle of the work, as indicated by the title, is a loose-leaf volume with a very substantial cover, which enables obsolete pages to be thrown out and replaced by revised pages. The convenience of this is evidenced by the fact that in the issue of twelve parts the number of substitute pages is quite considerable. The inconvenience is obvious from the fact that some of the pages already have *a*, *b*, *c*, etc., to replace a single page and two indices have already been issued. Furthermore the covers are already so full that if it is to be continued a fresh cover will have to come out. Nevertheless there is quite a lot to be said for the loose-leaf system where it concerns ephemeral legislation frequently implemented by regulations which are easy to alter and, perhaps consequently, are not infrequently altered from time to time. Practitioners need, however, to be careful to see that their index does in fact cover all the parts that are issued otherwise they may miss a vital new rule or modification of an existing rule. The index to this volume, so far as we have tested it, seems to be adequate.

With regard to the material it is, perhaps inevitably, somewhat unequal. A number of the statutes and rules are printed without notes and without cross-references. This is probably the result of the loose-leaf system which makes cross-reference difficult, but in this heterogeneous collection of emergency legislation it seems that cross-reference above everything should be as full as possible. Quite a number of the statutes can have little or no interest to the practitioner and consequently they do not require the time and money necessary for a detailed commentary. It is open to question whether a practitioner should be called upon to pay for them at all. Other statutes are of the first importance, such, for example, as the Rent Restriction Act. These statutes have in fact been annotated in some detail, though in the case mentioned it is thought that even more elaborate notes would have been helpful. It should be said, however, that where a statute has been annotated with any degree of thoroughness the notes are accurate and helpful. Time alone can show whether or not it will be necessary to replace this work by a new edition in similar fashion to the ordinary text-book. Nevertheless it is an interesting experiment carried out with skill.

The Land Registration Act, 1925. By BRICKDALE and STEWART-WALLACE. Fourth edition. By Sir JOHN STEWART STEWART-WALLACE, C.B., Chief Land Registrar of H.M. Land Registry; of the Inner Temple, Barrister-at-Law. London: Stevens & Sons, Ltd. 1939. xx + 637 pp. Price £1 10*s*.

WHAT is familiarly known as *Brickdale's Land Registration Act* requires no introduction to the profession and normally it would be

sufficient to record and welcome a new edition which in a sense is overdue, since the last appeared very shortly after the passing of the new Act and much litigation has inevitably affected even the principles of registered land. It is noteworthy that the Land Registration Act has so far attracted very little of this litigation.

The new edition, however, differs from its predecessor in some important respects. These changes can best be summarised in the words of the learned editor in his preface. He says: "In preparing a Fourth Edition the opportunity has been taken somewhat to abridge the Third Edition. This abridgement has not been reached by any shortening of the commentary on the Act and Rules or on procedure and practice. On the contrary, this has been added to and brought up to date throughout. The abridgement has been reached by omitting the 'Dissertation on details of conveyancing practice' as well as the 'Precedents' and 'Model Registers' of the Third Edition. These features have now rather outgrown their purpose." The reason given by the learned editor is that all the leading text-books on conveyancing contain dissertations on conveyancing under the Act and the precedent books contain precedents "with the same richness as those for unregistered land". It is felt that the latter view at least rather overstates the case and those who have a copy of the third edition will not readily part with it. For an up-to-date and authoritative commentary all the increasing band of practitioners who are from time to time concerned with registered conveyancing will be grateful. It is inevitable that a commentary coming from such hands should express the view of those concerned with the administrative side of this conveyancing. This view is helpful and sometimes indispensable to the practitioner, but it must be remembered that it does not necessarily take into account all the matters which affect the lay client. Practitioners must use this volume, but they should also consult other works written more from the angle of the practitioner who has to serve and protect the wishes of the client. To take an example, on p. 257 the learned editor suggests that covenants for title should not be employed, presumably because they are unnecessary, where the vendor is transferring an absolute title. This appears completely to ignore the importance of covenants for title in connection with overriding interests, leaving aside any other problem, and it is in respect of matters which are overriding interests that the question of suing on the covenant has most frequently arisen of recent years. It is true that the form of the covenant for title presents difficulty (see Potter, *Registered Land Conveyancing*, p. 68), but this seems to be no justification for its omission in respect of interests which in registered conveyancing leave the purchaser peculiarly unprotected.

The criticism just made does not necessarily detract from the value of this work. Registered conveyancing is a mixture of administrative and private law. It is, therefore, of inestimable value that practitioners should know the administrative point of view of the application of the Act and Rules.